THE MYTH OF DIRECTOR CONSENT: AFTER *SHAFFER*, BEYOND *NICASTRO*

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ABSTRACT

Delaware, the most influential state in corporate America, routinely invokes an unconstitutional statute, Section 3114, to assert personal jurisdiction over virtually every nonresident director and officer. The Supreme Court's June 2011 decision in J. McIntyre Machinery, Ltd. v. Nicastro *underscores Section 3114's constitutional problems, which were plain in 1977 when Delaware adopted it in the wake of* Shaffer v. Heitner.

This Article is the first in a generation to challenge Section 3114 and the first ever to consider it in light of Nicastro. *I expose the Delaware Court of Chancery's rationalizations upholding the statute and bring to light that court's failure to conduct the required minimum contacts analysis. In reality, the Court of Chancery routinely claims personal jurisdiction over virtually everyone sued for breach of duty as a director or officer of a Delaware corporation.*

The fiduciary duty litigation against Berkshire Hathaway head Warren Buffett and his former second-in-command turned antagonist, David Sokol, exemplifies the statute's continuing harm. Neither the defendants nor any of the named plaintiffs lives in Delaware. Berkshire Hathaway has no business office, no assets, and no employees in Delaware. No relevant events took place in Delaware, nor has any harm been suffered there. This lack of any connection to Delaware is nearly universal in Delaware corporate litigation. Simply put, no defendant has minimum contacts with Delaware.

Yet Delaware claims that Buffett, Sokol, and every other Berkshire officer and director "impliedly consents" to in personam jurisdiction, simply because Berkshire Hathaway is incorporated there. The Supreme Court has rejected jurisdiction by "implied consent" for over fifty years. Sokol vehemently contests Delaware's claim and is spending a significant amount of money to litigate jurisdiction.

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Electronic copy available at: http://ssrn.com/abstract=2043324

I propose an amenability statute for officers and directors rooted in their actual consent. This statute is workable and is constitutional under Nicastro*. It will help stem the migration of corporate litigation away from Delaware, and will provide a desirable measure of neutrality in Delaware between management and stockholders.*

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I. INTRODUCTION

For over 35 years, Delaware, the center of the corporate law universe,[1] has used an unconstitutional amenability statute, Section 3114, to secure in personam jurisdiction over nonresident directors and officers of Delaware corporations.[2] This system results in defendants who need not be subject to personal jurisdiction in Delaware litigating suits in which they face liability for hundreds of millions of dollars in damages.[3] Additionally, it allows Delaware to retain more corporate litigation involving Delaware corporations than it otherwise might retain.

A recent and vivid example of the unconstitutional, expensive, and Delaware-centering effects of Section 3114 is the litigation involving Warren Buffett and David Sokol.[4] Sokol was a key subordinate to Warren Buffett, the legendary investor and head of Berkshire Hathaway.[5] By many accounts Sokol was considered the most likely executive to succeed Buffett as head of Berkshire.[6] In 2010 Buffett asked Sokol to meet with investment bankers about possible acquisitions for Berkshire.[7] One of the companies suggested by the bankers was Lubrizol.[8] Sokol investigated Lubrizol and met with its CEO.[9] He then presented the case for acquiring Lubrizol to Buffett. Buffett, after further analysis, decided to pursue the deal and soon thereafter reached an agreement to acquire Lubrizol.[10] Between the time the bankers suggested Lubrizol to Sokol and the time he presented the

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[1]Over half of all publicly traded U.S. corporations and nearly two-thirds of the 500 largest corporations are incorporated in Delaware. DIV. OF CORPS., DEL. DEP'T OF STATE, http://corp.delaware.gov/ (last visited Mar. 31, 2012).

[2]DEL. CODE ANN. tit. 10, § 3114 (2009). The statute has covered officers only since 2003. Act of June 30, 2003, ch. 83, 2003 Del. Laws 126 (codified at DEL. CODE ANN. tit. 10, § 3114(b) (2009)).

[3]*See infra* note 26 and accompanying text.

[4]*See infra* notes 16-19 and accompanying text.

[5]*See* Liam Pleven & Leslie Scism, *Buffett Successor List Gets Shorter*, WALL ST. J., Mar. 31, 2011, at A4, *available at* http://online.wsj.com/article/SB10001424052748704530204576233292549845136.html (referring to Sokol as the "often-praised deputy" and a possible successor to Warren Buffett).

[6]*See id.*

[7]*See* Press Release, Berkshire Hathaway Inc., Berkshire Hathaway Inc. Bd. of Dirs., Trading in Lubrizol Corp. Shares by David L. Sokol (Apr. 27, 2011) [hereinafter Berkshire Press Release]; *see also* The Lubrizol Corp., Definitive Proxy Statement, at 16-22 (Schedule 14A) (May 5, 2011) (discussing the facts involving Mr. Sokol).

[8]Berkshire Press Release, *supra* note 7.

[9]*Id.*

[10]*Id.*

possibility to Buffett, Sokol purchased almost 100,000 shares of Lubrizol.[11] While he disclosed to Buffett that he owned Lubrizol stock, Sokol did not disclose the amounts or the timing of his purchases.[12] Declining to press Sokol on the issue, Buffet did not learn of the details of Sokol's purchases until Berkshire Hathaway undertook its due diligence investigation of Lubrizol.[13] In response, Sokol quickly resigned his corporate offices and, since then, has become a non-person in the Berkshire world.[14] Sokol made about $3 million when Lubrizol was acquired.[15]

When these facts became public, several Berkshire Hathaway shareholders filed derivative suits against Sokol, Buffett, and the other Berkshire directors in the Delaware Court of Chancery alleging a breach of their fiduciary duties.[16] The shareholders claimed that Sokol breached his duty by buying Lubrizol on the basis of inside information.[17] They further alleged that Buffett and the other Berkshire board members breached their duties by failing to monitor Sokol and his actions.[18] Personal jurisdiction over all the individual defendants was based on Section 3114.[19]

Significantly, neither Buffett nor Sokol has any known connection with Delaware. They neither live nor work there.[20] Nor is any of the named

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[11] *Id.*

[12] Berkshire Press Release, *supra* note 7.

[13] *Id.*

[14] *See* Erik Holm, *Warren Buffett Erases Departed Deputy Sokol*, DEAL J. (Feb. 27, 2012, 8:43 AM), http://blogs.wsj.com/deals/2012/02/27/warren-buffett-erases-departed-deputy-sokol/.

[15] *See* Shira Ovide, *David Sokol: Timeline of His Lubrizol Stock Purchases*, WALL ST. J. L. BLOG (Mar. 30, 2011, 6:59 PM), http://blogs.wsj.com/deals/2011/03/30/david-sokol-timeline-of-his-lubrizol-stock-purchases/ (referring to Sokol purchasing 96,060 Lubrizol shares at maximum of $104 per share and holding shares through Berkshire Hathaway acquisition at $135 per share).

[16] *See* Order of Consolidation, *In re* Berkshire Hathaway Inc. S'holders Litig., 2011 WL 2428748 (Del. Ch. June 13, 2011) (No. 6392); Verified Shareholder Derivative Complaint, Gonzalez v. Sokol, 2011 WL 1950009 (Del. Ch. May 13, 2011) (No. 6485); Verified Shareholder Derivative Complaint, Kirby v. Sokol, 2011 WL 1526859 (Del. Ch. Apr. 18, 2011) (No. 6392).

[17] *See, e.g.*, Verified Shareholder Derivative Complaint, Gonzalez v. Sokol, 2011 WL 1950009 ("Sokol used his position of influence to enrich himself at the expense of Berkshire through improper and illicit insider trades.").

[18] *See* Ruling of the Court on Defendants' Motion to Dismiss at 2, 5-6 *In re* Berkshire Hathaway Inc. Deriv. Litig., No. 6392-VCL, 2012 WL 978867 (Del. Ch. Mar. 19, 2012).

[19] *See* Opening Brief in Support of Defendant David L. Sokol's Motion to Dismiss the Amended Complaint, No. 6392-VCL, *In re* Berkshire Hathaway Inc. S'holders Litig., 2011 WL 3419472 (Del. Ch. Jul 29, 2011) .

[20] I conducted an extensive search to find a connection, and was unable to find any between Sokol and Delaware or Buffett and Delaware except that, until 2005, Buffett attended The Coca-Cola Company annual stockholders meeting in Wilmington, Delaware in his capacity as a director of Coca-Cola. *See Blue Hen Investment Club Meets Legendary Financier Warren Buffett*, U.S. STATE NEWS (April 28, 2006), *available at* 2006 WLNR 10695092; Harry R. Weber, *Coke's Profits Rise 10% in Quarter; Stockholders Get Upbeat Message*, BUFFALO NEWS (Apr. 20, 2006),

plaintiffs a Delaware resident. Furthermore, neither Berkshire Hathaway, nor the Berkshire subsidiaries that Sokol headed, has its headquarters, principal place of business, or any employees in Delaware and no board meetings or other business meetings are alleged to have taken place there.[21] But under Section 3114, Delaware claimed personal jurisdiction over Buffett, the other Berkshire board members, and possibly Sokol.[22] By early 2012, Sokol's attorney fees in responding to this suit and related SEC inquiries were over $1.4 million.[23] Although the case is still in its preliminary stages, Buffett and the other directors have undoubtedly spent at least as much in attorney fees as Sokol.[24]

The Berkshire Hathaway litigation is not unusual. Virtually every Delaware lawsuit charging directors with breach of fiduciary duties relies on Section 3114 for personal jurisdiction over the defendants.[25] In yet another example, the Disney board was also served under Section 3114 in the $130 million litigation over the hiring and resignation of Michael Ovitz.[26] Delaware's only connection to the litigation was its role as the state of incorporation.[27]

The overwhelming majority of Delaware corporations, like Berkshire Hathaway and Disney, have neither headquarters nor principal place of business in Delaware.[28] Many probably do no business nor do they have

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available at 2006 WLNR 6750496.

[21] *See supra* note 20.

[22] *See* DEL. CODE ANN. tit. 10, § 3114 (2009). Sokol is alleged to have been acting as a representative or scout on behalf of Berkshire and not acting as a fiduciary of either of the Berkshire subsidiaries he headed, NetJets and Mid-American Energy Holdings Co. Because Sokol was never a Berkshire director and not an officer as defined in Section 3114(b), he probably is not subject to service under Section 3114. DEL. CODE ANN. tit. 10, § 3114(b).

[23] *Squawk Box: Ask Warren* (CNBC television broadcast Feb. 27, 2012), transcript *available at* http://www.cnbc.com/id/46541258/CNBC_Transcript_Part_1_Warren_Buffett_on_Buying_Houses_and_the_Next_Berkshire_CEO.

[24] *See* Ruling of the Court on Defendants' Motion to Dismiss at 12-13, *In re* Berkshire Hathaway Inc. Deriv. Litig., No. 6392-VCL, 2012 WL 978867 (Del. Ch. Mar. 19, 2012) (dismissing the complaint without prejudice under DEL. CH. CT. R. 23.1 for failure to adequately plead demand futility).

[25] *See, e.g., infra* notes 26-27 and accompanying text.

[26] Appellants' Reply Brief at 6 n.5, *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006), 2006 WL 162610.

[27] *See id.*

[28] *See Number of Returns Filed, by Type of Return and State, Fiscal Year 2010*, IRS DATA BOOK, tbl.3 (2011), http://www.irs.gov/pub/irs-soi/10db03nr.xls (reporting that only about 24,000 corporations have their principal place of business in Delaware, including 15,000 small Subchapter S corporations). The Delaware Secretary of State reports about 945,000 active corporations and other business entities formed under Delaware law. 2011 DEL. SEC'Y OF STATE ANN. REP., at 1, *available* at http://corp.delaware.gov/2011CorpAR.pdf. Even allowing for a large number of LLCs and limited partnerships in those 909,000 active business entities, it is clear that only a tiny fraction of Delaware corporations, perhaps on the order of 3% to 5%, actually have their principal place of

assets or employees in Delaware. These corporations are the focus of this Article and can be appropriately labeled "pseudo-domestic corporations."[29] This Article solves the problem of personal jurisdiction over a corporation's nonresident directors and officers.[30] These individuals have no contacts with Delaware, other than serving as directors or officers of a Delaware corporation.[31] It is likely that only a miniscule number of the directors and officers of Delaware corporations are resident in Delaware.[32]

Why might a fiduciary who is going to be sued somewhere prefer not to be sued in Delaware? One obvious reason is that Delaware is probably less convenient for the fiduciary than the state in which the fiduciary lives or in which the corporation is headquartered. More pointedly, fiduciaries may wish to avoid Delaware when the law is clear.[33] A fiduciary may wish to avoid Delaware judges, who have been known to express strong views on cases that have not reached trial and have had only limited discovery.[34] For example, Vice Chancellor Laster, the judge presiding over the Berkshire Hathaway litigation, said the claim against Buffett and the Berkshire board

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business there. *See* DEL. SEC'Y OF STATE ANN. REP., *supra*.

Only two of the 500 largest U.S. corporations, Du Pont (E.I. Du Pont de Nemours and Company) and Sallie Mae (SLM Corporation) are actually based in Delaware. *Our Annual Ranking of America's Largest Corporations*, FORTUNE 500, http://money.cnn.com/magazines/fortune/fortune 500/2011/states/DE.html. Among the 200 largest privately held American corporations, only the maker of Gore-Tex (WL Gore & Associates, Inc.) is headquartered in Delaware. *America's Largest Private Companies*, FORBES, http://www.forbes.com/lists/2011/21/private-companies-11_rank.html (last visited July 14, 2012).

[29]I have coined the term "pseudo-domestic corporation" as a back-formation from "pseudo-foreign corporation." A corporation that has its headquarters and principal place of business in state *A*, in which it is not incorporated, is, as to state *A*, a "pseudo-foreign corporation." Elvin R. Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137 (1955) (appearing to be the first use of the term). A corporation that does business in state *A*, a state in which it is not incorporated, is a "foreign corporation" in state *A*. It is a "domestic corporation" in its state of incorporation. ERIC A. CHIAPPINELLI, CASES AND MATERIALS ON BUSINESS ENTITIES 127, 850 (2d ed. 2010). For brevity, I will use "corporation" or "Delaware corporation" to mean only Delaware pseudo-domestic corporations, unless otherwise noted.

[30]Professor Verity Winship has made a nuanced study of the question of Section 3114 as it applies specifically to officers. She, too, finds Section 3114 constitutionally problematic. Verity Winship, *Jurisdiction Over Corporate Officers and the Incoherence of Implied Consent*, U. ILL. L. REV. (forthcoming 2013) (manuscript at 3), *available at* http://ssrn.com/abstract=2064952.

[31]Again, for brevity, I will use "director" and "officer" to mean only nonresidents, unless otherwise noted. I will also use "fiduciaries" to mean nonresident directors and officers, collectively.

[32]*See infra* note 323 (noting that Delaware has approximately 0.3% of the nation's population).

[33]*See* Sara Lewis, *Transforming the "Anywhere But Chancery" Problem into the "Nowhere But Chancery" Solution*, 14 STAN. J.L. BUS. & FIN. 199, 200 (2008) ("[T]he Delaware Chancery and Supreme Court have developed an extensive and thorough body of corporate law.").

[34]*See, e.g.*, *infra* notes 37-38 and accompanying text.

was "profoundly weak."[35] At the same time he severely criticized Sokol and described the facts against him as "quite strong."[36] He went on to say: "[t]he only meaningful target here is Sokol, not the independent directors, not even Buffett."[37] He made these remarks in the context of a motion to dismiss where no discovery had yet been taken and where he must assume the truth of the complaint.[38] Relatedly, Chancellor, Leo E. Strine, Jr. is well known for his personal invective about those who appear before him.[39]

On the other hand, even though a fiduciary might have no connection to Delaware, there are reasons why he or she might prefer to be sued there rather than elsewhere. The Delaware Court of Chancery is routinely lauded for its efficiency, expertise, and even-handedness.[40] Another reason to prefer Delaware might be the lack of jury trials in the Court of Chancery.[41] Traditional litigation wisdom teaches that a defendant involved in a lawsuit with highly technical or complicated legal principles, fearing that a jury may become confused about the legal principles, might prefer a bench trial if he or she has a strong legal defense.[42] Even where the law is clear and readily comprehended by a juror, a fiduciary may prefer the more predictable application of those principles in a bench trial than take a chance on a jury.[43] Another reason a fiduciary would prefer being sued in Delaware is that punitive damages are not available in the Delaware Court of Chancery, while courts in other states hearing the same claim for relief might award them.[44]

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[35]Ruling of the Court on Defendants' Motion to Dismiss at 6, *In re* Berkshire Hathaway Inc. Deriv. Litig., No. 6392-VCL, 2012 WL 978867, at *6 (Del. Ch. Mar. 19, 2012).

[36]*Id.* at *7.

[37]*Id.* at *8.

[38]*Id.* at *2.

[39]*See* David Weidner, *Is Leo Strine Serious?*, WALL ST. J., Mar. 8, 2012, *available at* http://online.wsj.com/article/SB10001424052970203961204577268191951502420.html.

[40]*See* LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 5-6 (2007) *available at* http://corp.delaware.gov/whycorporations_web.pdf (discussing the Delaware Court of Chancery's nationally recognized expertise in corporate litigation); Press Release, U.S. Chamber Institute for Legal Reform, *Delaware's Legal Climate Best in the Nation*, (Mar. 22, 2010), *available at* http://www.instituteforlegalreform.com/media/press/delawares-legal-climate-best-in-the-nation (ranking Delaware' s litigation environment as number one in the country for fairness); Erin Quinn, *DE Judge Talks Corporate Law*, THE REV. (Apr. 17, 2012), http://www.udreview.com/de-judge-talks-corporate-law-1.2850768#.T_JWyMVi1-w.

[41]DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 1.08 (2011).

[42]*See* Note, *The Case for Special Juries on Complex Civil Litigation*, 89 YALE L. J. 1155, 1155 (1980) ("Many believe that juries are ill-equipped to understand the factual and legal issues involved in complex business litigation.").

[43]*See* Quinn, *supra* note 40 (citing to Chancellor Strine in describing juries as "unpredictable" and tending to "ward off businesspeople," as compared with the Court of Chancery, which is more predictable and therefore allows for better business planning).

[44]*Compare* Beals v. Wash. Int'l, Inc., 386 A.2d 1156, 1160 (Del. Ch. 1978) (holding that

Paradoxically, because Delaware law is so well developed, it may cut against litigants' choosing to sue in Delaware.[45] At first blush this expertise may suggest that fiduciaries should prefer litigating in Delaware; however, because of the internal affairs doctrine, Delaware corporate law—case law as well as statutory law—will be applied regardless of the forum in which a case is litigated.[46] Because Delaware's law is so detailed when compared to the corporate law of nearly every other jurisdiction,[47] fiduciaries may have confidence that judges outside of Delaware could correctly (or at least favorably) apply the law to their case.[48] Thus, they may be less inclined to want to litigate in Delaware.[49] As one of Berkshire Hathaway's subsidiaries might have put it, "Delaware corporate law: so easy a caveman could do it."

Although there are no statistics, litigation under Section 3114 probably understates the number of fiduciaries who would prefer to litigate in states other than Delaware. Fiduciaries who believe they are not subject to personal jurisdiction in Delaware are unlikely to default because a significant monetary judgment may be entered against them.[50] Once that judgment is final, the only defense to a collection lawsuit is that the Delaware court lacked personal jurisdiction.[51] While such a defense might be upheld, if it were not, the fiduciary would be barred from raising any defense on the merits; therefore, few rational fiduciaries would take that

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punitive damages are unavailable in the absence of legislation) *with* Madrid v. Marquez, 33 P.3d 683, 686 (N.M. Ct. App. 2001) (awarding punitive damages in New Mexico).

[45] *See* Lewis, *supra* note 33, at 200.

[46] *See* Vantagepoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1112 (Del. 2005).

[47] *See* Lewis, *supra* note 33, at 200.

[48] *See* Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 64 (2009).

[49] *See id.*

[50] *See* Boddie v. Connecticut, 401 U.S. 371, 378 (citing Windsor v. McVeigh 93 U.S. 274, 278 (1876)) ("Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance . . . ."); 10A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2688, at 63 (3d ed. 1998) [hereinafter WRIGHT & MILLER] ("Once the court determines that a judgment by default should be entered, it will determine the amount and character of the recovery that should be awarded.").

[51] *See* 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 55.84[2][a] (3d ed. 1997) [hereinafter MOORE'S FEDERAL PRACTICE] ("A default judgment rendered without personal jurisdiction over the defaulting party is void."). *See* 18 MOORE'S FEDERAL PRACTICE, *supra*, § 130.04[3] ("A judgment may be void if it was rendered by a court that lacked personal jurisdiction, was issued in contravention of a statutory stay or sovereign immunity, or obtained by extrinsic fraud. These judgments are sometimes referred to as 'absolutely void,' *i.e.,* they are void and unenforceable in any jurisdiction. They remain subject to collateral attack if recognition or enforcement is sought either in the jurisdiction where rendered or in another jurisdiction.") (footnotes omitted).

chance.[52] Fiduciaries can also contest jurisdiction;[53] however, the likely result of a motion to dismiss for lack of personal jurisdiction would be a large legal bill, an adverse ruling, a displeased judge, and no immediate appeal. Even on appeal, the Delaware Supreme Court is likely to find personal jurisdiction.[54]

Furthermore, defendants are understandably reluctant to risk a judge's ire by seeking to litigate elsewhere, so they may not raise such issues unless they are convinced they will definitely succeed.[55] Essentially, fiduciaries of Delaware corporations are coerced into litigating in Delaware under Section 3114 except in unusual situations such as Sokol's.[56]

By contrast, Buffet is clearly covered by Section 3114 but has no known contacts with Delaware that would constitutionally support jurisdiction.[57] He is not contesting to personal jurisdiction, though it is impossible to know whether he would prefer litigating in Delaware to litigating somewhere else, possibly his home state of Nebraska. Buffett is revered in Omaha and has recently purchased the only newspaper there, possibly with an eye to ensuring good press.[58]

As described in Part II below, Delaware has been aware of the difficulty of obtaining constitutionally valid personal jurisdiction over directors since the 1920s.[59] The sequestration statute Delaware's General Assembly adopted in the 1920s was upheld against constitutional attacks for 50 years. But United States Supreme Court cases eroded the constitutional

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[52]*See* WRIGHT & MILLER, *supra* note 50, § 2684 ("When a judgment by default is entered, it generally is treated as a conclusive and final adjudication of the issues necessary to justify the relief awarded and is given the same effect as between the parties as a judgment rendered after a trial on the merits."). *See also id.* § 4442 ("Valid default judgments establish claim and defense preclusion in the same way as litigated judgments, and are equally entitled to enforcement in other jurisdictions.").

[53]2 MOORE'S FEDERAL PRACTICE, *supra* note 51, § 12.31[2] ("[T]he principal method for attacking the court's jurisdiction over the person of a defendant is a Rule 12(b)(2) motion.").

[54]*See, e.g.*, Istituto Bancario Italiano SpA v. Hunter Eng'g Co., Inc., 449 A.2d 210 (Del. 1982); Sternberg v. O'Neil, 550 A.2d 1105 (Del. 1988); N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007).

[55]*See* Brief of Special Counsel at 3, No. 5890-VCL, Scully v. Nighthawk Radiology Holdings, Inc. (Del. Ch. Mar. 11, 2011).

[56]*See supra* note 22.

[57]*See supra* note 21.

[58]*See* Press Release, Berkshire Hathaway Inc., Berkshire Hathaway to Acquire Omaha World-Herald Co. (Nov. 30, 2011), *available at* http://www.berkshirehathaway.com/news/NOV3011.pdf. For speculation that Buffett's motivation in buying the World-Herald was to control his public perception, *see* Richard Blackden, *Warren Buffett Buys Omaha World-Herald*, THE TELEGRAPH (Nov. 30, 2011), http://www.telegraph.co.uk/finance/newsbysector/ mediatechnology andtelecoms/media/8927193/Warren-Buffett-buys-Omaha-World-Herald.html.

[59]*See infra* notes 72-79 and accompanying text.

basis for the sequestration statute. Finally, in *Shaffer v. Heitner*, the Supreme Court struck down the sequestration statute, held that minimum contacts were required under the *International Shoe v. Washington* test,[60] and found that no such contacts had been shown.[61]

Within two weeks of *Shaffer*, the Delaware General Assembly adopted Section 3114, the current method for coercing personal jurisdiction over fiduciaries.[62] Section 3114 relies on the idea of implied consent, which had already been rejected by the Court at the time Section 3114 was enacted.[63] I contend in Part III.A that the Delaware drafters knew implied consent was probably invalid but nonetheless chose that approach anyway. This was likely because the General Assembly believed that it was preferable to a traditional long-arm statute, which they were convinced could not constitutionally cover fiduciaries who had no minimum contacts with Delaware.

I also expose, in Parts III.B-D, the Court of Chancery's expansion of Section 3114's scope to cover almost all actions by fiduciaries and that court's failure as a general matter to conduct a minimum contacts analysis. Typically, the Court of Chancery finds amenability from service as a fiduciary; it then finds the *International Shoe* test is met either from simply being a fiduciary or from the court's belief that fiduciaries foresee litigating in Delaware.[64] Often the Court of Chancery cites Delaware's interest in its corporations and its corporate law in support of personal jurisdiction.

Section 3114 was constitutionally invalid on the day it was enacted but, as I make clear in Part IV, *Nicastro*[65] reaffirms that the current Supreme Court would have no hesitation in striking that Section down. The *Nicastro* plurality and concurring Justices would invalidate Section 3114 because fiduciaries do not direct activities to Delaware.[66] The dissenting Justices would also invalidate Section 3114.[67] In the dissenters' view, it would not be fair or reasonable to permit litigation against fiduciaries in Delaware, which has no affiliation with the parties or the dispute.[68]

Delaware can constitutionally assert personal jurisdiction over fiduciaries if it adopts a new amenability statute. I propose a new statute in

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[60]326 U.S. 310, 316 (1945).
[61]*See* Shaffer v. Heitner, 433 U.S. 186, 212 (1977).
[62]*See infra* notes 116-17 and accompanying text.
[63]*See* notes 227-28 and accompanying text.
[64]*See infra* notes 205-09 and accompanying text.
[65]J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (plurality opinion).
[66]*See infra* Parts IV.A, IV.C.
[67]*See infra* Part IV.B.
[68]*See infra* notes 344-45 and accompanying text.

Part V. This proposed statute is constitutional and will be more effective than Section 3114. The proposed statute requires fiduciaries explicitly to agree to personal jurisdiction every year and requires Delaware corporations to file those agreements with the Secretary of State as part of their annual report.[69] Actual consent is effective as a matter of amenability and the Court has upheld the constitutionality of analogous agreements in adhesion settings similar to the situation fiduciaries face.[70]

I also argue in Part V that Delaware should adopt my proposed statute because it would help Delaware retain litigation that is currently in danger of moving to other states. For Delaware, this new statute is politically wise, as it will likely be viewed as a pro-stockholder move at a time when Delaware is viewed by many as being in a particularly anti-stockholder mode. The view that Delaware is "anti-stockholder" is reflected in the current fight over Delaware forum-selection charter and bylaw clauses.[71]

II. PRELUDE: DELAWARE SEQUESTRATION AND *SHAFFER V. HEITNER*

Delaware became the preeminent state of incorporation for foreign corporations by the end of World War I.[72] By the 1920s, the modern form of shareholder derivative litigation was the primary means of controlling director power.[73] Delaware was a favored forum for bringing derivative suits involving Delaware corporations because personal jurisdiction over the corporation, a necessary though nominal party, was assured.[74] In the pre-*International Shoe* days, personal jurisdiction over a corporation in another state was often uncertain.[75]

But directors, who were necessary and indispensible parties to derivative litigation, did not typically live in Delaware. Most foreign corporations' directors lived and worked where the corporation had its principal place of business or its main corporate office. Under *Pennoyer v.*

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[69] *See infra* Part V.A.

[70] *See infra* notes 423-29 and accompanying text.

[71] *See generally* Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 345-352 (2012).

[72] *See* Christopher Grandy, *New Jersey Corporate Chartermongering, 1875-1929*, 49 J. ECON. HIST. 677, 687 (1989); William E. Kirk, III, *A Case Study in Legislative Opportunism*, 10 J. CORP. L. 233, 254-55 (1984).

[73] *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 277 (1932) (noting the lack of shareholder ability to influence directors directly).

[74] *See* Louisville, Cincinnati, and Charleston RR. Co. v. Letson, 43 U.S. 497, 555 (1844).

[75] *See* 16 Robert C. Casad, Moore's Federal Practice – Civil § 108.23[1] (2011).

Neff,[76] getting in personam jurisdiction over the entire board in one state was frequently problematic because, for example, the directors of a corporation headquartered in New York might easily live in New York, Connecticut, and New Jersey.[77]

Compounding the jurisdiction question was the practical problem of effecting personal service on each director, who had to be located and served within the forum state.[78] Shareholder plaintiffs, who rationally preferred Delaware as the forum for derivative litigation involving Delaware corporations, wanted a sure and easy way to bring the directors into the Delaware Court of Chancery.[79]

In 1927 the Delaware General Assembly obliged by enacting Section 366, known as the sequestration statute.[80] From 1927 until *Shaffer* in 1977, Section 366 was the primary method of obtaining personal jurisdiction over fiduciaries of Delaware corporations.[81] The legal theory supporting Section 366 was that, under *Pennoyer*, a state had dominion over the property within its borders.[82] Delaware, eventually alone among the states, declared that stock in Delaware corporations is always located in Delaware, regardless of where the stock certificates or stockholders might be.[83] A plaintiff could seize a defendant's property in the forum and a forum court could adjudicate the plaintiff's dispute with the defendant, even where the property seized was unrelated to the dispute.[84] This form of personal jurisdiction was called "unrelated quasi-in-rem" or "Type II quasi-in-rem" jurisdiction.[85]

A shareholder would use Section 366 to seize the stock owned by director defendants and the defendants would be forced to make a general appearance, essentially converting the action from unrelated quasi-in-rem to in personam.[86] A director who did not appear would lose his or her stock to

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[76]95 U.S. 714 (1877).

[77]*See* CASAD, *supra* note 75, §§ 108.20-22.

[78]*See id.* § 108.20.

[79]*See id.* (concluding that consent, presence, and domicile were the only permissible bases for personal jurisdiction).

[80]*See* Act of Apr. 12, 1927, ch. 217, 35 Del. Laws 217 (codified as amended at DEL. CODE ANN. tit. 10, § 366 (2012)).

[81]*See* Gordon v. Michel, 297 A.2d 420, 421 (Del. Ch. 1972); WOLFE & PITTENGER, *supra* note 41, § 3.04[a][2].

[82]*See* CASAD, *supra* note 75, § 108.21.

[83]*See* DEL. CODE ANN. tit. 8, § 169 (2012).

[84]*See* Shaffer v. Heitner, 433 U.S. 186, 199 n.17 (1977).

[85]*See* Casad, *supra* note 75, § 108.70; 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 1070 (3d ed. 2011).

[86]*See Shaffer*, 433 U.S. at 190-93.

satisfy the plaintiff's claim.[87] Section 366 was upheld against several constitutional challenges.[88]

The debtors' rights cases decided by the Supreme Court in the late 1960's and early 1970's eroded the constitutional certainty of Section 366.[89] Those debtors' rights cases expanded the necessity of providing pre-seizure notice, prompt post-seizure hearing, or other safeguards when defendants' property was seized before a final judgment.[90] Section 366 and the Court of Chancery Rule governing Section 366 actions[91] had no pre-seizure safeguards, and the post-seizure protections were arguably deficient.[92]

It was on the basis that Section 366 did not provide sufficient pre- and post-seizure protections that *Shaffer v. Heitner*[93] was heard in the Supreme Court.[94] Arnold Heitner, a New York resident, filed a shareholder derivative suit in the Delaware Court of Chancery against twenty-eight directors and officers of The Greyhound Corporation, a Delaware corporation, and its California subsidiary.[95] The complaint asserted that the fiduciaries were liable to the corporation because they caused it to violate the antitrust laws.[96]

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[87] *See* DEL. CODE ANN. tit. 10, § 366 (2012).

[88] *See, e.g.*, Trans World Airlines, Inc. v. Hughes, 185 A.2d 762, 765 (Del. Ch. 1962), *aff'd*, 185 A.2d 886, 888-89 (Del. 1962) (applying Section 366 to the seizure of the nonresident's property); *see also* Ownbey v. Morgan, 256 U.S. 94, 108-11 (1921) (upholding a similar Delaware seizure statute, the Supreme Court of the United States affirmed the Supreme Court of Delaware's decision and found that the defendant was not deprived of his property without due process of law).

[89] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (pre-termination hearing of Social Security Disability benefits); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 613-14 (1975) (pre-hearing garnishment of commercial goods); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679-80 (1974) (pre-hearing seizure of property); Mitchell v. W.T. Grant Co., 416 U.S. 600, 618-20 (1974) (pre-hearing sequestration of consumer goods); Fuentes v. Shevin, 407 U.S. 67, 96-97 (1972) (pre-hearing replevin of consumer goods); Bell v. Burson, 402 U.S. 535, 542-43 (1971) (pre-hearing suspension of driver's license and automobile registration); Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (pre-hearing cessation of AFDC benefits); Sniadach v. Family Fin. Corp., 395 U.S. 337, 341-42 (1969) (pre-hearing garnishment of wages); Connecticut v. Doehr, 501 U.S. 1, 18 (1991) (pre-hearing seizure of real property).

[90] *See supra* note 89 and accompanying text.

[91] DEL. CT. CH. R. 4(db).

[92] *See* Ernest L. Folk, III & Peter F. Moyer, *Sequestration In Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 761 (1973).

[93] 433 U.S. 186 (1977). The best description of the events leading up to *Shaffer* is in Wendy Collins Perdue, *The Story of* Shaffer: *Allocating Jurisdiction Among the States*, *in* CIVIL PROCEDURE STORIES 135 (Kevin M. Clermont ed., 2d ed. 2008).

[94] *Shaffer*, 433 U.S. 186 (Jurisdictional Statement *in* Appendix), *available at* http://civprostories.law.cornell.edu/chap03/shaffer01.pdf.

[95] *Shaffer*, 433 U.S. at 189-90.

[96] *Id.* at 190.

Those violations resulted in a civil judgment of over $13 million and fines of $600,000 for violating an I.C.C. order.[97]

Heitner obtained an order of sequestration under Section 366 against the defendants, seizing over $1.2 million worth of stock, equivalent to more than $7 million today.[98] The individual defendants made a special appearance and moved to quash and vacate the sequestration.[99] Predictably, they lost in the Court of Chancery and the Delaware Supreme Court.[100] However, the defendants appealed to the Supreme Court of the United States, which noted probable jurisdiction and heard the case on the merits.[101] The defendants' argument was rather broad-based, but by the time the case reached the United States Supreme Court, they focused on the argument that Section 366 was unconstitutional because it violated the debtors' rights cases, especially *Fuentes v. Shevin* and *Mitchell v. W.T. Grant Co.*[102]

The Supreme Court, though, decided *Shaffer* on a different constitutional theory, which may explain why the opinions are not as helpful as they could have been.[103] Justice Marshall, speaking for the Court, held that all methods by which states assert personal jurisdiction, including quasi-in-rem, must be measured by the minimum contacts test in *International Shoe.*[104] Jurisdiction is valid only if the defendants have certain "minimum contacts" with the forum state such that assertion of jurisdiction "does not offend traditional notions of fair play and substantial justice."[105]

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[97] *Id*. at 190 & nn.2-3.

[98] *See* Heitner v. Greyhound Corp., 1975 WL 417 (Del. Ch. May 12, 1975), *aff'd*, 361 A.2d 225 (Del. 1976), *rev'd sub nom* Shaffer v. Heitner, 433 U.S. 186 (1977), *reprinted in* 1 DEL. J. CORP. L. 188 (1976). On the present value of the stock seized *see Calculators*, BUREAU OF LABOR STATISTICS, http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1%2C551%2C733&year1= 1974&year2= 2012 (last visited Dec. 1, 2012).

[99] *See Heitner*, 1975 WL 417, *reprinted in* 1 DEL. J. CORP. L. at 190-191.

[100] *See id.*, *reprinted in* 1 DEL. J. CORP. L. at 197.

[101] Shaffer v. Heitner, 429 U.S. 813 (1976) (*prob. juris. noted*).

[102] Fuentes v. Shevin, 407 U.S. 67 (1972) (holding Florida and Pennsylvania prejudgment replevin provisions, which deny the right to a prior opportunity to be heard before property is seized from the possessor, effectively denies due process of law); Mitchell v. W.T. Grant Co., 416 U.S. 600, 618 (1974) (holding that the Louisiana system seeks to protect the debtor's interest and minimize the risk of error which would include allowing the creditor's wrongful possession of the property).

[103] *See Shaffer*, 433 U.S. at 206 ("We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions in rem as well as in personam.").

[104] *Id.* at 212; *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) ("[The] clause does not contemplate that a state may make a binding judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.").

[105] *Shaffer*, 433 U.S. at 203.

Although the Delaware courts had not applied such an analysis, the Supreme Court believed it had sufficient facts to decide whether *International Shoe* had been met.[106] The *Shaffer* Court measured minimum contacts by deciding whether the defendant had "purposefully availed [him or herself] of the privilege of conducting activities in the forum state."[107] The Court held that the presence of property unrelated to the merits of the action did not constitute sufficient contact with the forum state to permit jurisdiction.[108] The Court held that accepting a position as a fiduciary is not sufficiently availing to satisfy the minimum contacts test.[109] Serving as a fiduciary only shows that Delaware law should govern the underlying dispute between shareholders and fiduciaries.[110] Furthermore, Delaware had not enacted an amenability statute explicitly covering directors.[111] The Court held that Delaware, lacking any other connection between the directors and the forum, could not exercise jurisdiction over the defendants.[112]

III. AFTER *SHAFFER*, DELAWARE'S FAMOUS REACTION

A. *Section 3114, the Director Implied Consent Statute, Enacted and Upheld*

Delaware's reaction to *Shaffer* is a twice-told tale,[113] familiar to every law student.[114] The only process for bringing directors into corporate litigation had been taken away and no other Delaware statute would reach them.[115] Delaware's General Assembly acted within two weeks[116] and

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[106] *See id.* at 213-16.

[107] *Id.* at 216 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

[108] *Id.* at 213.

[109] *Shaffer*, 433 U.S at 215-16.

[110] *See id.*

[111] *Id.* at 216. In fact, Delaware had not even adopted a general long-arm statute at that time. *See* Jack B. Jacobs, *Personal Jurisdiction Over Corporate Officers and Directors: Recent Developments*, 4 DEL. J. CORP. L. 690, 692 (1979).

[112] *Shaffer*, 433 U.S. at 216-17.

[113] *See* RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 584-85 (10th ed. 2010); RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE CASES, MATERIALS, AND QUESTIONS 111 (5th ed. 2009); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE CASES AND MATERIALS 173 (10th ed. 2009); RICHARD L. MARCUS ET AL., CIVIL PROCEDURE A MODERN APPROACH 795-96 (5th ed. 2009); STEPHEN C. YEAZELL, CIVIL PROCEDURE 93-94 (7th ed. 2008).

[114] That is, "familiar" to every law student who actually read the notes after *Shaffer* in the casebook.

[115] *See* WOLFE & PITTENGER, *supra* note 41, § 3.05[a][2][i] ("The *Shaffer* decision left a

adopted the current Director Implied Consent Statute—title 10, Section 3114 of the Delaware Code.[117] Delaware expanded the statute in 2003 to include officers as well.[118] The statute reads:

> Every nonresident . . . who . . . accepts election or appointment as a director . . . of a corporation organized under the laws of this State or who . . . serves in such capacity, . . . shall, by such acceptance or by such service, be deemed thereby to have consented to the appointment of the registered agent of such corporation . . . as an agent upon whom service of process may be made in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such director . . . is a necessary or proper party, or in any action or proceeding against such director . . . for violation of a duty in such capacity, ... Such acceptance or service as such director . . . shall be a signification of the consent of such director . . . that any process when so served shall be of the same legal force and validity as if served upon such director . . . within this State and such appointment of the registered agent . . . shall be irrevocable.[119]

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large void in the ability of the Delaware courts to enforce and interpret Delaware corporation law, in particular the nature and scope of the fiduciary obligations of the directors of Delaware corporations.").

[116]One of the members of the committee that drafted Section 3114 remarked that the Section was enacted so quickly because *Shaffer* was decided on June 24, only one week before the Delaware General Assembly session expired. *See* Jacobs, *supra* note 111, at 694. The legislature would not be back in session until six months later. Hence the General Assembly passed the act by June 30 and the Governor signed it into law a week later. *See id.*; *see also* DEL. CONST. art. II, § 4 (General Assembly session begins in January and must conclude by the end of June).

[117]*See* Act of July 7, 1977, ch. 119, 61 Del. Laws § 1 (codified at DEL. CODE ANN. tit. 10, § 3114 (2009)).

[118]*See* Act of June 30, 2003, ch. 83, 74 Del. Laws § 3 (codified at DEL. CODE ANN. tit. 10, § 3114(b) (2009)). The change was made because, after Sarbanes-Oxley, fewer senior officers of public companies also served as directors. *See* Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1769 n.91 (2006). To ensure that corporate policy-makers were amenable to personal jurisdiction, the statute was amended to cover officers. *See id.* at 1769.

[119]DEL. CODE ANN. tit. 10, § 3114(a) (2009). On the contemporary reaction to *Shaffer* and the adoption of Section 3114, *see generally* Jacobs, *supra* note 111, at 694; Jack B. Jacobs & Bruce M. Stargatt, *The New Delaware Director-Consent-to-Service Statute*, 33 BUS. LAW. 701 (1978); Sue Ann Dillport, *Jurisdiction Over Nonresident Directors, Officers, and Shareholders: "Director" Consent Statutes After* Shaffer v. Heitner, 32 RUTGERS L. REV. 255 (1979); David L. Ratner & Donald E. Schwartz, *The Impact of* Shaffer v. Heitner *on the Substantive Law of Corporations*, 45 BROOKLYN L. REV. 641 (1979); Bruce M. Stargatt, *The New Delaware Director-Consent-to-Service Statute*, 3 DEL. J. CORP. L. 217 (1978); Rodman Ward, Jr., *A Delaware Phoenix: The Fall*

As was the sequestration procedure, Section 3114 is vital to personal jurisdiction over nonresident directors of Delaware corporations.[120]

The statue was challenged immediately in *Armstrong v. Pomerance*, a derivative suit.[121] The defendant directors in their challenge made limited appearances to contest personal jurisdiction under Section 3114.[122] The only contact with Delaware was the defendants' accepting election as directors of a Delaware corporation after the statute's effective date.[123] The Delaware Supreme Court correctly held that the test for personal jurisdiction was whether the defendants' acceptance of the directorship was sufficient to exert personal jurisdiction over them without offending traditional notions of fair play and substantial justice.[124]

Justice McNeilly, speaking for the court, candidly acknowledged that, "the defendants' numerical contacts with this State [were] minimal, i.e., limited to their acceptance of directorships in a Delaware corporation."[125] Despite the defendants' attenuated connections with Delaware, the court unanimously found that Section 3114 was constitutional.[126]

Justice McNeilly pointed to three aspects of being a director that constituted sufficient contact with Delaware to justify personal jurisdiction. First, the defendants' powers *qua* directors were created by Delaware law.[127] Second, the directors had "explicit statutory notice" that they could be haled into Delaware courts.[128] He made no mention, and none is in the Court of Chancery opinion,[129] whether defendants had actual notice of the statute. Finally, by purposefully accepting the directorships, the defendants acceded to a director's power to govern the corporation, including the possibility of receiving a loan from or being indemnified by the corporation.[130] The *Armstrong* court argued forcefully that Delaware had a strong and

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of Sequestration and the Enactment of a Director Service Statute, 3 DEL. J. CORP. L. 1 (1977); James C. Reed, Note, *Minimum Contacts and Delaware Directors Before and After* Shaffer v. Heitner, 4 DEL. J. CORP. L. 445 (1979); Susan Stuckert, Note, *A Constitutional Analysis of the New Delaware Director-Consent-to-Service Statute*, 70 GEO. L.J. 1209 (1982).

[120] *See* WOLFE & PITTENGER, *supra* note 41, § 3.05[a][2][ii] ("Section 3114 is now the typical method for effecting service of process upon nonresident directors of Delaware corporations in derivative actions and class actions involving alleged breaches of fiduciary duty.").

[121] 423 A.2d 174, 176 (Del. 1980).

[122] *Id.* at 175.

[123] *Id.* at 176.

[124] *Id*.

[125] *Armstrong*, 423 A.2d at 176.

[126] *Id.* at 179.

[127] *See id.* at 179-80.

[128] *See id.* at 180.

[129] *See* Pomerance v. Armstrong, 1979 WL 2701 (Del. Ch. July 17, 1979), *aff'd*, 423 A.2d 174 (Del. 1980), *reprinted in* 5 DEL. J. CORP. L. 349 (1980).

[130] *Armstrong*, 423 A.2d at 176 & n.4.

protectable interest in ensuring its own corporations' litigation be located in Delaware.[131] Of course, that analysis is most pertinent to the choice of law question and not the personal jurisdiction question.

The *Armstrong* court, rather ironically, simply refused to address the defendants' argument that *Shaffer* precluded a finding of minimum contacts from service as a director alone. The court "distinguished" *Shaffer* tautologically by noting that *Shaffer* was based on share ownership while jurisdiction under Section 3114 was based on service as a director.[132] In a telling conflation of due process requirements and Section 3114's language, the court concluded: "requiring the defendants to impliedly consent to the assertion of Delaware in personam jurisdiction over them in actions alleging breach of their fiduciary obligations to the corporation does not seem unreasonable."[133]

Thus the seeds were sown for decades of misapplication of due process principles. The Delaware Supreme Court upheld Section 3114, which predicated personal jurisdiction on the defendant's implied consent by accepting a directorship. At the same time, the court recognized that *Shaffer* required that personal jurisdiction be based upon minimum contacts. The court simply ignored Justice Marshall's finding that service as a director is not a sufficient contact for jurisdiction. Defendants apparently did not seek review by the Supreme Court of the United States.[134]

B. *The Delaware Courts' Expansion of Section 3114*

Although *Armstrong* and a few Court of Chancery opinions seem to cabin the reach of Section 3114, the roughly 100 decisions under the statute have made it clear that personal jurisdiction is nearly always found under the statute without an individualized minimum contacts analysis.[135] The Delaware Court of Chancery both expanded the coverage of Section 3114 and truncated the test for personal jurisdiction under the statute.

Armstrong itself set out three criteria that supposedly limited the statute's reach. First, the director must be charged with a breach of fiduciary duty;[136] second, the lawsuit must be "inextricably bound up with Delaware

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[131] *See id.* at 177.
[132] *See id.* at 179-80.
[133] *Id.* at 176.
[134] I have been unable to discover why the decision was made not to seek further review.
[135] *See, e.g.*, Ryan v. Gifford, 935 A.2d 258, 274 (Del. Ch. 2007) (applying section 3114 and concluding that the court had personal jurisdiction over nonresident former chief financial officer).
[136] *See Armstrong*, 423 A.2d at 176 n.5.

law;" and third, Delaware must have a strong interest in providing a forum.[137] After *Armstrong*, the Delaware Court of Chancery purported to interpret Section 3114 narrowly to ensure that directors' due process rights are preserved.[138]

Even on a plain reading these restrictions permit personal jurisdiction to be asserted in the vast majority of suits against directors. As to the first requirement, the theory of stockholder derivative suits is that the directors will not bring suit against a defendant that has wronged the corporation, typically another director or directors. The primary setting in which a director could harm the corporation in a compensable way is when he or she breaches a duty of care or loyalty.[139] Directors could, on occasion, violate the statutory restrictions on their power, as, for example, where they knowingly approve an illegal dividend.[140] But such a violation would likely constitute a breach of the duty of loyalty or duty of care as well and thus would fall within the statute's ambit under *Armstrong*.[141] One empirical study found that nearly 80% of the corporate litigation in the Delaware Court of Chancery raised fiduciary duty issues.[142]

The second and third *Armstrong* limitations on the statute's reach are, again, almost axiomatic in a stockholder derivative action. The substantive cause of action sounds in Delaware's statutory and judge-made corporate law and does not involve the substantive law of other states. The history of Delaware corporate litigation makes clear that Delaware perceives a strong interest in providing a forum for stockholder-plaintiff suits against the directors of domestic corporations, even pseudo-domestic corporations.[143]

In fairness, the Delaware Court of Chancery has declined to expand Section 3114 to some kinds of law suits against fiduciaries. Most obviously, the court has held that Section 3114 may not be used by plaintiffs bringing tort claims against the director's corporation.[144] In a pivotal decision,

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[137] *Id.*

[138] *See, e.g.*, LeCrenier v. Cen. Oil Asphalt Corp., 2010 WL 5449838, at *3 (Del.Ch. Dec. 22, 2010) (stating that Section 3114 provided no statutory basis for finding personal jurisdiction over the current and former nonresident corporate officers because plaintiff's complaint failed to allege the officers breached any fiduciary duty owed to them).

[139] *See, e.g.*, *Armstrong* 423 A.2d at 177, 176 n.5 (stating that if the allegations that defendants breached their fiduciary duties had been true, they would have caused a foreseeable injury to the corporation).

[140] *See* DEL. CODE ANN. tit. 8, § 174(a) (2012).

[141] *See Armstrong* 423 A.2d at 177, 176 n.5.

[142] *See* Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 166-67 (2004).

[143] *See Armstrong*, 423 A.2d at 177-78.

[144] *See* LeCrenier v. Cen. Oil Asphalt Corp., 2010 WL 5449838, at *3 (Del.Ch. Dec. 22,

Chancellor Marvel interpreted the word "or", in the phrase "in which such director . . . is a necessary or proper party, ***or*** in any action or proceeding against such director . . . for violation of his duty in such capacity," to be conjunctive, and thus requiring plaintiffs to assert a claim for breach of fiduciary duties against the defendant rather than simply asserting that the director is a necessary or proper party.[145]

Several cases have held that Section 3114 is unavailable for federal securities claims on the theory that such claims are not sufficiently related to Delaware law for Delaware to assert personal jurisdiction.[146] And Delaware judges have refused to expand Section 3114 to claims against fiduciaries of Delaware corporations for acts in their capacity as directors or officers of a Delaware corporation's foreign parent corporation.[147] At least one judge found a limit in declaring that simply holding a security is not sufficient to invoke the statute.[148]

Two of the most seasoned practitioners in Delaware have tacitly recognized that Section 3114, despite the rhetoric of its limitations, is actually quite broad in its reach.[149] They make the point by noting the few areas Section 3114 would not cover.[150] They theorize that Section 3114 might not cover declaratory judgment actions by a corporation against its directors for indemnification.[151] Of course, the court would certainly have personal jurisdiction where the director himself or herself files suit for indemnification against the corporation, obviously raising the same issues as in the declaratory judgment context.[152] Thus this "limitation" is really just a

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2010).

[145]Hana Ranch, Inc. v. Lent, 424 A.2d 28, 30-31 (Del. Ch. 1980) (emphasis added).

[146]*See, e.g.*, Van De Walle v. L.F. Rothschild Holdings, Inc., 1994 WL 469150, at *3 (Del. Ch. Aug. 2, 1994) (asserting that the relationship between the Securities Act claims, the State of Delaware, and the defendants was not strong enough for the court to exercise personal jurisdiction); *In re* USACafes, L.P. Litig., 600 A.2d 43, 54 (Del. Ch. 1991) (finding that the court had no personal jurisdiction over the directors because "the federal securities claims were distantly related to the alleged breach of fidicuary duty").

[147]*See* Hamilton Partner. L.P. v. Englard, 11 A.3d 1180, 1201 (Del. Ch. 2010) (quoting Ruggiero v. FuturaGene, Plc., 948 A.2d 1124, 1134 (Del. Ch. 2008)) ("[A] corporate director or officer of a foreign corporation cannot be haled into a Delaware court for an act of the corporation simply because the officer or director has directed the corporation to take that act. . . . Rather, the corporate officer or director must be shown to have substantial contacts in Delaware or with a nexus to Delaware having a clear relationship to the cause of action.").

[148]*See* Ryan v. Gifford, 935 A.2d 258, 270 (Del. Ch. 2007) ("[M]erely holding and allowing options to vest is unrelated to the duties an officer owes to the corporation; it is instead merely incidental to employment with a corporation and the compensation or incentive structure the corporation utilizes.").

[149]*See* WOLFE & PITTENGER, *supra* note 41, § 3.04[a][2][iv].

[150]*See id.*

[151]*See id.*

[152]*See id.*

practical quirk. They also suggest that the Delaware courts might not have personal jurisdiction under Section 3114 over directors where the lawsuit is one to establish the director's status,[153] though there may be other avenues for personal jurisdiction in that event.[154]

But these constraints on the scope of Section 3114 are more than outweighed by the cases expanding the Section's reach. The most important expansion in the scope of Section 3114 has come via two theories. One expands Section 3114 based upon the relief sought and the other expands it based upon the operative facts.

Once personal jurisdiction is validly asserted against a fiduciary under Section 3114, these two theories permit the plaintiff to assert additional claims and seek additional relief that would not otherwise be available. As two other knowledgeable Delaware practitioners put it, "[T]he nonresident is before the Court for any and all relief that might be necessary to do justice between the parties. . . . A plaintiff . . . may successfully obtain personal jurisdiction . . . for all claims via Section 3114, so long as one of those claims involves a breach of fiduciary duty."[155]

Of course, an even more potent doctrine permits plaintiffs to assert any additional claim against the fiduciaries once personal jurisdiction has been asserted for a breach of fiduciary duty claim under Section 3114.[156] Several cases articulate this rule, though some of them limit the claims to those that are in essence ancillary, that is, those that arise from a common nucleus of operative facts surrounding the fiduciary duty claims.[157] Thus plaintiffs have been able to add breach of contract claims,[158] to obtain an

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[153] *See* WOLFE & PITTENGER, *supra* note 41, § 3.04[a][2][iv].

[154] *See* Feeley v. NAHAOCG, LLC, 2012 WL 966944, at *5 (Del. Ch. Mar. 20, 2012) (citing to an LLC statute that is the analogue to Section 225 and gives court in rem jurisdiction to determine officeholder); *see also* DEL. CODE ANN. tit. 8, § 225(a) (2010) (containing an amenability provision).

[155] *E.g.*, R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, BALOTTI AND FINKELSTEIN'S DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 13.2 (2011) (quoting Gans v. MDR Liquidating Corp, 1990 WL 2851, at *10 (Del. Ch. Jan. 10, 1990)) (footnotes and internal quotation marks omitted).

[156] *See* Infinity Investors Ltd. v. Takefman, 2000 WL 130622, at *6 (Del. Ch. Jan. 28, 2000).

[157] *See id.*; *see also* Actrade Fin. Techs. Ltd. v. Aharoni, 2003 WL 25575794, at *9 (Del. Ch. Oct. 23, 2003) (extending jurisdiction to any and all relief for the corporation's claims); Canadian Commercial Workers Indus. Pension Plan v. Alden, 2006 WL 456786, at *11 (Del. Ch. Feb. 22, 2006) (analyzing whether a fraud claim is "predicated on the same nucleus of facts as one of the fiduciary duty claims"), *reprinted in* 31 DEL. J. CORP. L. 1070, 1090 (2006); Manchester v. Narragansett, Inc., 1989 WL 125190, at *7 (Del. Ch. Oct. 18, 1989) (recognizing that the statute authorizes personal jurisdiction over nonresident defendants "for actions taken in their capacities as corporate directors").

[158] *See* Gans v. MDR Liquidating Corp, 1990 WL 2851, at *9-*10 (Del. Ch. Jan. 10, 1990);

order cancelling the issuance of stock,[159] tortious interference with contract,[160] and fraud claims for actions the defendant took before becoming a director.[161]

Another way in which the Delaware judiciary has expanded the scope of Section 3114 is by a relatively capacious conception of the actions directors take *qua* directors that thereby subject them to personal jurisdiction. In three key cases, Chancellor Allen aggressively defined what it means to act as a director for purposes of Section 3114. In *Hoover Industries, Inc. v. Chase*,[162] the director argued that any culpable actions he took were *qua* officer, which was not then covered by Section 3114.[163] Chancellor Allen rejected that position, writing:

> It may be that every deliberate or intentional wrong visited upon a corporation by a person who serves as a director at the time of the wrong, constitutes a breach of the director's duty of loyalty. The principle that would lead to such a conclusion would be that a director *qua* director owes a duty to the corporation to so conduct himself in all of his capacities so as not to inflict an intentional, wrongful injury upon the corporation. The proposition hardly seems radical. I need not further explore the soundness of that view now, however, as there is a narrower principle that is applicable here . . . .
>
> To adopt Mr. Chase's proposed reading of that statute would be to encourage a jurisprudence of distinctions of metaphysical subtlety; since very frequently the most active directors are officers as well, it might encourage preliminary hearings for the drawing of such distinction. Nothing in the language of Section 3114 requires such an approach. A sympathetic

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see also Manchester, 1989 WL 125190, at *7 (finding the breach of contract claim and breach of fiduciary duty claim to be sufficiently related).

[159] *See* Jaffe v. Regensberg, 1980 WL 3039 (Del. Ch. Jan. 10, 1980), *reprinted in* 6 DEL. J. CORP. L. 318, 321 (1981).

[160] *See* Infinity Investors Ltd. v. Takefman, 2000 WL 130622, at *6 (Del. Ch. Jan. 28, 2000).

[161] *See* Canadian Commercial Workers Indus. Pension Plan v. Alden, 2006 WL 456786, at *11 (Del. Ch. Feb. 22, 2006), *reprinted in* 31 DEL. J. CORP. L. 1070, 1090 (2006).

[162] 1988 WL 73758 (Del. Ch. July 13, 1988), *reprinted in* 14 DEL. J. CORP. L. 332 (1989).

[163] *Hoover Indus., Inc.*, 1988 WL 73758, *reprinted in* 14 DEL. J. CORP. L. at 337. For a more detailed discussion of the problems of applying Section 3114 to officers, *see* Winship, *supra* note 30.

> reading of the statute, with its purpose in mind, counsels rejection of it.[164]

Most breathtakingly, in *In re USACafes, L.P. Litigation*,[165] Chancellor Allen held that Section 3114 captures director actions that breached no duty to the corporation, but that caused the corporation to breach duties to others.[166]

Two Chancellors have concluded, "there is no safe harbor for a director to argue that his [or her] malfeasance was committed in his [or her] capacity as an officer or employee, rather than as a director."[167] Likewise, Vice Chancellor Lamb extended Section 3114 to cover actions by a director in his capacity as a director of a Delaware corporation's foreign subsidiary.[168]

In a parallel expansion, several cases have held that directors may be required to answer in Delaware courts under Section 3114 for claims asserted against them not by shareholders, but by creditors of insolvent or dissolved corporations.[169]

C. *Delaware Disclaims Other Bases of Jurisdiction Over Fiduciaries*

Could other Delaware statutes or court rules provide amenability over fiduciaries? No. In the first place, the Delaware courts have been crystal clear that Section 3114 is the only statute that covers fiduciaries in the overwhelming majority of instances about which Delaware cares most.[170] A year after Section 3114 was adopted, the Delaware General Assembly passed

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[164] *Hoover Indus., Inc.*, 1988 WL 73758, *reprinted in* 14 DEL. J. CORP. L. at 337-38; *see also* Harris v. Carter, 582 A.2d 222, 232 (Del. Ch. 1990) (determining whether the defendants were "charged with committing wrongful acts in a directorial capacity").

[165] 600 A.2d 43 (Del. Ch. 1991).

[166] *See id.* at 51-52. Other judges have built on this foundation. *See* Technicorp Intern. II, Inc. v. Johnston, 2000 WL 713750, at *5 (Del. Ch. May 31, 2000), *reprinted in* 26 DEL. J. CORP. L. 689, 696 (2001).

[167] William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 1002-03 (2003).

[168] *See* Actrade Fin. Techs. Ltd. v. Aharoni, 2003 WL 25575794, at *7-*8 (Del. Ch. Oct. 23, 2003).

[169] *See, e.g.*, North Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 2006 WL 2588971, at *12 (Del. Ch. Sept. 01, 2006), *reprinted in* 32 DEL. J. CORP. L. 612, 638 (2007); Geyer v. Ingersoll Publ'ns Co., 621 A.2d 784, 790 (Del. Ch. 1992); Gans v. MDR Liquidating Corp., 1990 WL 2851, at *9 (Del. Ch. Jan. 10, 1990); Kidde Indus., Inc. v. Weaver Corp., 593 A.2d 563, 565-66 (Del. Ch. 1991).

[170] *See* WOLFE & PITTENGER, *supra* note 41, § 3.04[a][1][ii].

a general long-arm statute, Section 3104(c), taken, essentially verbatim, from the most common long-arm statute.[171]

Some provisions of Section 3104(c) might seem to cover nonresident fiduciaries. A nonresident is amenable to personal jurisdiction if he or she "transacts any business" or performs any "work or service" in the state.[172] A nonresident is also subject to personal jurisdiction if he or she does an act or omits an act in Delaware that "causes tortious injury" there.[173] Finally, a nonresident is amenable to personal jurisdiction if he or she "causes a tortious injury" anywhere by an act or omission outside Delaware, and "regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services . . . in the State."[174]

But the Delaware courts' consistent interpretation precludes jurisdiction over directors and officers for breach of fiduciary duties under Section 3104(c).[175] The current Chancellor and his immediate predecessor have plainly asserted that Section 3104's requirement of acts in Delaware is not metaphysical. The statute requires that things happen within the state but, in fiduciary litigation, actions do not happen in Delaware.[176] The fiduciary's "allegedly wrongful actions against the corporation will, in most instances, have occurred outside Delaware. Absent some act within Delaware itself that can be charged to the [fiduciary], our general 'long-arm' service of process statute is insufficient."[177] They reinforce the same position taken, at the time Section 3104 was adopted, by one of the Delaware General Corporation Law Committee members who later became a Vice Chancellor and now serves on the Supreme Court.[178]

The Delaware courts take the phrase "in the state" literally. A Maryland car dealer who, over several years, sold hundreds of cars to Delaware dealers, knowing the cars were going to Delaware, was not engaged in a persistent course of conduct in Delaware.[179] An Illinois transfer agent performing transfer services in New York for hundreds of Delaware corporations was likewise not engaged in a persistent course of conduct in

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[171] *See* DEL. CODE ANN. tit. 10, § 3104(c)(1) (2008).

[172] *Id.*

[173] *Id.*

[174] *Id.* § 3104(c)(4).

[175] Section 3104(c) is a fallback provision when Section 3114 is ineffective so the courts do not deal primarily with claims of personal jurisdiction under 3104(c) unless Section 3114 has been found inapplicable. *See id.* § 3104(k).

[176] *See* Chandler & Strine, *supra* note 167, at 1003 n.121.

[177] *Id.* at 1003.

[178] *See* Jacobs, *supra* note 111, at 692.

[179] *See* Finkbiner v. Mullins, 532 A.2d 609, 620 (Del. Super. Ct. 1987).

Delaware.[180] Similarly, an out-of-state director who serves on a Delaware corporation's board should not be found to be engaged in a persistent course of conduct in Delaware.

The federal District Court in Delaware has flatly declared that being a director is not "transacting business" in Delaware.[181] In the same way, the Court of Chancery has held that a nonresident does not transact business in Delaware by contracting with a Delaware corporation, even where the contract involves the nonresident becoming endued with a corporate law status.[182] A transfer agent for hundreds of Delaware corporations, which were two-thirds of the agent's clients, was not transacting business in Delaware.[183] That situation is strongly analogous to a fiduciary in that both the transfer agent and the fiduciary have contracted with a Delaware corporation and performed duties described under the Delaware General Corporation Law.

It is highly doubtful whether the economic harm to a Delaware corporation resulting from a breach of fiduciary duty by a corporation's directors is a tort that occurs in Delaware.[184] Even if the harm can be said to have occurred there, the act causing the harm does not. Both must occur there for jurisdiction to arise under Section 3104(c)(3).[185]

An out-of-state act that causes out-of-state injury, which describes the typical shareholder fiduciary duty allegations against a director or officer, can be brought in Delaware only where the fiduciary "regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services . . . in the State."[186] Fiduciaries do not do business or perform services in Delaware.

Could service as a fiduciary be a "persistent course of conduct" in Delaware? The Court of Chancery has held that continued ownership and

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[180] *See* Ohrstrom v. Harris Trust Co. of N.Y., 1998 WL 8849, at *4 (Del. Ch. Jan. 8, 1998); *see also* Matthew v. Laudamiel, 2012 WL 605589, at *9-*10 (Del. Ch. Feb. 21, 2012) (asserting that a Missouri limited liability company with its principal place of business in Missouri did not regularly solicit business or engage in any other persistent course of conduct in Delaware).

[181] *See* Venoco, Inc. v. Marquez, 2003 WL 21026787, at *3 (D. Del. May 5, 2003).

[182] *See* Abajian v. Kennedy, 1992 WL 8794 (Del. Ch. Jan 17, 1992), *reprinted in* 18 DEL. J. CORP. L. 179, 194 (1993). *But see* NRG Barriers, Inc. v. Jelin, 1996 WL 377014, at *4 (Del. Ch. July 1, 1996). *See also* Chandler v. Ciccoricco, 2003 WL 21040185, at *10-*11 (Del. Ch. May 5, 2003) (construing Section 3104 liberally and concluding "that the filing of a Certificate of Designation of Rights and Preferences is a transaction of business").

[183] *See* Ohrstrom v. Harris Trust Co. of N.Y., 1998 WL 8849, at *3 (Del. Ch. Jan. 8, 1998).

[184] *See Abajian*, 1992 WL 8794, *reprinted in* 18 DEL. J. CORP. L. at 195.

[185] *See Ohrstrom*, 1998 WL 8849, at *3.

[186] DEL. CODE ANN. tit. 10, § 3104(c)(4) (2008).

control of Delaware companies is not a "persistent course of conduct."[187] By analogy, continued service as a fiduciary would not be a persistent course of conduct, either. If it were, that would be tantamount to holding that the status of director or officer alone was sufficient for the long-arm statute.

Only where the fiduciaries, as an important part of their alleged breach of duties, cause the corporation to undertake an act in Delaware, such as forming a Delaware subsidiary, could it be said that they do anything in Delaware.[188] Simply causing the corporation to own stock in a Delaware corporation is not enough.[189]

A case law extension of the long-arm statute's reach, the conspiracy theory of jurisdiction, would not typically provide personal jurisdiction over fiduciaries, either. If another defendant is subject to personal jurisdiction, a fiduciary who conspires with that defendant is, too, if (1) "a substantial act or substantial effect in furtherance of the conspiracy occurred in [Delaware]"; (2) "the [fiduciary] knew or had reason to know of the act in [Delaware] or that acts outside [Delaware] would have an effect in [Delaware]"; and (3) "the act in, or effect on, [Delaware] was a direct and foreseeable result of the conduct in furtherance of the conspiracy."[190] This theory will seldom be applicable in fiduciary litigation because it requires an act in Delaware, which, as we have seen, is highly unlikely.

Presumably the Delaware courts could re-interpret Section 3104 to cover fiduciaries. A few isolated opinions from other states that have adopted the Uniform Interstate and International Procedure Act's long-arm statute have found that nonresident directors acting wholly outside the forum state can be amenable to personal jurisdiction.[191] But even if the Delaware courts were to change their considered view of their long-arm statute, it would not solve the problem. As Shakespeare might have put it, Delaware can call directors from the vasty deep, but will they come when Delaware does call for them?[192] If personal jurisdiction over nonresident directors

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[187]Red Sail Easter Ltd. Partners v. Radio City Music Hall Prods., Inc., 1991 WL 129174, at *3 (Del. Ch. July 10, 1991).

[188]*See, e.g.*, *id.* at *2; AeroGlobal Capital Mgt., LLC., v. Cirrus Inds. Inc., 871 A.2d 428, 440-41 (Del. 2005).

[189]*See AeroGlobal*, 871 A.2d at 439.

[190]Matthew v. Laudamiel, 2012 WL 605589, at *7 (Del. Ch. Feb. 21, 2012) (quoting Istituto Bancario Italiano SpA v. Hunter Eng'g Co., 449 A.2d 210, 225 (Del. 1982)).

[191]*See, e.g.*, Pittsburgh Terminal Corp. v. Mid Allegheny Corp., 831 F.2d 522, 528 (4th Cir. 1987); Costa Brava P'ship III, L.P. v. Telos Corp., 2006 WL 1313985, at *4 (Md. Cir. Ct. Mar. 30, 2006); Walter v. M. Walter & Co., 446 N.W.2d 507, 509 (Mich. Ct. App. 1989).

[192]*See* WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE FOURTH act 3, sc. 1 ("Glendower: I can call spirits from the vasty deep. Hotspur: Why, so can I …. But will they come when you do call for them?").

would not meet due process, the fact that a clear amenability statute applies is insufficient.

But these approaches are really a matter of divining legislative intent. To the extent that the Delaware judiciary have taken a greatly expanded view of the statutory language and gone beyond the intent of the Delaware General Assembly, the legislature could simply acquiesce by amending the statute to conform to the judiciary's interpretation, or amending the statute to make clear that the judiciary has gone too far.

D. *The Delaware Courts' Constitutional Approaches to Validating Section 3114*

1. Validating Section 3114 by Truncating the Due Process Test

Of much greater concern is the Delaware Court of Chancery's habit of truncating the due process test applied under Section 3114. The Delaware courts seldom undertake a thorough minimum contacts analysis.[193] Instead, they have, occasionally, discussed the test but have made a cursory application or, more frequently, have taken an approach that both is flatly contrary to the teaching of the Supreme Court of the United States and fails to determine whether fiduciaries have minimum contacts.[194]

The Delaware Court of Chancery opinions applying Section 3114 have seldom referenced the due process case law, strongly indicating that the Delaware judges see no need to apply minimum contacts, as it had been developed in the key pre-*Shaffer* cases such as *International Shoe*,[195] *McGee*,[196] and *Hanson*.[197] One would think that Supreme Court cases decided post-*Armstrong*, such as *Kulko v. Superior Court*,[198] *World-Wide Volkswagen Corp. v. Woodson*,[199] *Rush v. Savchuk*,[200] *Burger King v. Rudzewicz*,[201] and *Asahi Metal Industry Co., Ltd. v. Superior Court*[202] would have loomed large in the Court of Chancery's application of Section 3114 to

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[193] *See Armstrong*, 423 A.2d 177 & n.6.
[194] *See id.* at 174-75.
[195] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
[196] McGee v. Int'l Life Ins. Co., 355 U.S. 220, 200-01 (1957).
[197] Hanson v. Denckla, 357 U.S. 235, 250-51 (1958).
[198] 436 U.S. 84 (1978).
[199] 444 U.S. 286 (1980).
[200] 444 U.S. 320 (1980).
[201] 471 U.S. 462 (1985).
[202] 480 U.S. 102 (1987).

fiduciaries. But with one exception,[203] the Court of Chancery is content to simply and occasionally, cite the key cases.[204]

In practice, Court of Chancery judges have found personal jurisdiction by truncating the due process requirements in a variety of overlapping ways. In some instances, the court has equated the plaintiff's allegation of a fiduciary duty breach with satisfaction of the minimum contacts test.[205] As Chancellor Allen wrote, "[t]he ability of a shareholder to invoke Section 3114 cannot turn upon whether the facts allege [sic] constitute a valid claim."[206] In fact, Chancellor Allen went so far as to note that, "culpable inaction by directors is a sufficient ground for a breach of fiduciary duty claim permitting service of process under Section 3114."[207] Other judges have invoked jurisdiction by finding that accepting a director position is accepting the benefits and protections of Delaware law and thus that due process is met.[208]

Perhaps most frequently, the Court of Chancery judges use some form of the argument that foreseeability is jurisdiction. These judges argue that by becoming a director of a Delaware corporation, it is foreseeable that one may be sued in Delaware; due process is therefore met because jurisdiction based on such foreseeability comports with fair play and substantial justice.[209] Chancellor Strine is particularly fond of this trope.[210]

Vice Chancellor Parsons echoed this approach in *Canadian Commercial Workers Indus. Pension Plan v. Alden*:

> The touchstone of this minimum contacts analysis is foreseeability – whether the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

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[203] The exception is Chancellor Allen's opinion in *USACafes*; he sees the touchstone of minimum contacts as foreseeability that one will be haled into court, and of course relies primarily on *World-Wide Volkswagen*. *In re* USACafes, L.P. Litig., 600 A.2d 43, 50-51 (Del. Ch. 1991) (discussing *World-Wide Volkswagen Corp*, 444 U.S. at 292).

[204] *See, e.g.*, Sample v. Morgan, 935 A.2d 1046, 1063 & n.60 (Del. Ch. 2007); Ryan v. Gifford, 935 A.2d 258, 273 & n.44 (Del. Ch. 2007); Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc., 1996 WL 608492, at *1 n.3 (Del. Ch. Oct. 16, 1996); Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc., 1995 WL 694397, at *7, *9 (Del. Ch. Nov. 21, 1995).

[205] *See, e.g.*, *Ryan*, 935 A.2d at 272; *Carlton Invs.*, 1996 WL 608492, at *2-*3; *Carlton Invs.*, 1995 WL 694397, at *7-*8.

[206] *Carlton Invs.*, 1995 WL 694397, at *13.

[207] *Carlton Invs.*, 1996 WL 608492, at *3 n.7.

[208] *See Ryan*, 935 A.2d at 273.

[209] *See, e.g.*, *Carlton Invs.*, 1995 WL 694397, at *9.

[210] *See, e.g.*, Sample v. Morgan, 935 A.2d 1046, 1064 n.63 (Del. Ch. 2007); HMG/Courtland Props., Inc. v. Gray, 729 A.2d 300, 304 n.3 (Del. Ch. 1999).

> [Defendant]'s acceptance of a position as a director of a Delaware corporation certainly should have made him aware of the possibility of being haled into court here.[211]

Chancellor Strine has also predicated Section 3114 on "implied consent" and foreseeability:

> The legal fiction of implied consent embodied in § 3114 rests on one real fact: § 3114 is in the Delaware Code and provides clear notice to any reasonably informed director that accepting service as a director of a Delaware corporation brings with it an obligation to defend official capacity suits here. This fact is the underpinning of § 3114's constitutionality.[212]

Chancelor Strine buttressed this interpretation with his understanding of *Armstrong* as holding, "by virtue of [Section] 3114, defendant directors who accept such privileges are put on notice that they can be haled into court here to answer for breaches of Delaware corporation laws."[213]

Other opinions suggest that Delaware's interest in ensuring that its own law is correctly applied to Delaware corporations is either sufficient to assert personal jurisdiction or at least is an important element in finding personal jurisdiction.[214] This despite the fact that *Shaffer* itself pointed out that Delaware's interest in interpreting its own laws is relevant to choice of law principles, not personal jurisdiction principles.[215] These opinions reflect *Armstrong*'s focus on Delaware's interest, for which it cited *McGee* as authority.[216] Some Delaware cases seem to conflate Delaware's interest in the correct application of Delaware corporate law, with Delaware's potential interest in providing a forum for wronged plaintiffs.[217] However, it is clear

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[211] *Canadian Commercial Workers*, 2006 WL 456786, at *12 (citations omitted) (internal quotation marks omitted), *reprinted in* 31 DEL. J. CORP. L. 1070, 1091-92 (2006).

[212] *HMG/Courtland Props.*, 729 A.2d at 306.

[213] *Id.* at 305 n.3. *See also* Caithness Res., Inc. v. Ozdemir, 2000 WL 1741941, at *5 n.21 (Del. Ch. Nov. 22, 2000) ("If joint ventureres who serve as members of governing bodies of Delaware entities would like to confine disputes between themselves to a chosen and convenient forum, they would be well-advised to contract to that end.").

[214] *See* Shaffer v. Heitner, 433 U.S. 186, 225-26 (1977) (Brennan, J., concurring in part and dissenting in part).

[215] *See id.* at 214-15.

[216] *See* Armstrong v. Pomerance, 423 A.2d 174, 177 n.6 (Del. 1980) (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)).

[217] *See In re* USACafes, L.P. Litig., 600 A.2d 43, 51 (Del. Ch. 1991); *see also* Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc., 1996 WL 608492, at *5 (Del. Ch. Oct. 16, 1996) ("Section

that most plaintiffs in suits against directors are nonresidents or, if by happenstance they were to be residents, they represent the interests of all shareholders, a miniscule percentage of whom reside in Delaware.[218]

The Court of Chancery's failings are ultimately traceable to *Armstrong*,[219] the Delaware Supreme Court case that held Section 3114 constitutional and which, of course, binds the Court of Chancery.[220] Most crucially, *Armstrong* found Section 3114 constitutional because the defendants met the *Hanson v. Denckla* "purposeful availment" test.[221] However, *Armstrong* fundamentally misunderstood that test, and this misunderstanding has been repeated by the Court of Chancery ever since. In *Hanson*, the Court said, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of *conducting activities within the forum State*, thus invoking the benefits and protections of its laws."[222]

The *Armstrong* court seriously misstated the "purposeful availment" test when it held that the defendants, "by purposefully availing themselves of the privilege of *becoming directors of a Delaware corporation*, have thereby accepted significant benefits and protections under the laws of this State."[223] By this statement and subsequent analysis, the *Armstrong* court misconstrued the due process test in two ways. First, it mistakenly interpreted the meaning of "conducting activities within the forum State."[224] Second, it misconstrued the level of "benefits and protections" that are sufficient to meet the "purposeful availment test."[225]

2. Validating Section 3114 on a Theory of Implied Consent

The *Armstrong* court concluded its due process analysis by stating that, because the defendants met the *Hanson* test, "requiring the defendants to impliedly consent to the assertion of Delaware in personam jurisdiction over them in actions alleging breach of their fiduciary obligations to the

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3114 recognizes the strong interest that this Court has in assuring the effective administration of the law governing corporations organized in Delaware . . . ."); Actrade Fin. Techs. Ltd. v. Aharoni, 2003 WL 25575794, at *9 (Del. Ch. Oct. 23, 2003) (asserting Delaware's significant interest in protecting Delaware companies from directors who breach their fiduciary duties).

[218] *See infra* note 325 and accompanying text.

[219] 423 A.2d 174 (Del. 1980).

[220] *See id.* at 179.

[221] *See id.* at 176; Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[222] *Hanson*, 357 U.S. at 253 (emphasis added).

[223] *Armstrong*, 423 A.2d at 176 (emphasis added).

[224] *See id.* at 179.

[225] *See infra* Part III.A for a fuller discussion of *Armstrong*'s misinterpretation of the Supreme Court's minimum contacts test.

corporation" comports with due process.[226] It is this statutory language and the *Armstrong* court's reinforcement that seem to lead the Delaware courts astray when applying the "purposeful availment" test. At the time *Armstrong* was decided, the Supreme Court of the United States had made it perfectly clear that predicating personal jurisdiction upon "implied consent" was both ineffective and unhelpful.[227] The Court has not reconsidered that view since and, in fact, recently reinforced it.[228]

For example, in *Shaffer*, Justice Marshall noted that when reviewing older cases relying on implied consent, "it became clear that they were in fact attempting to ascertain 'what dealings make it just to subject a foreign corporation to local suit'. . . . In *International Shoe*, we acknowledged that fact."[229] In fact, in *International Shoe* Chief Justice Stone wrote:

> True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, ... But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction.[230]

Justice Frankfurter later put a sharper point on the matter:

> It is true that . . . there has been some fictive talk to the effect that . . . the non-resident has "impliedly" consented to be sued there. In point of fact, however, jurisdiction in these cases does not rest on consent at all. The defendant may protest to high heaven his unwillingness to be sued and it avails him not. The liability rests on the inroad which the automobile has made on the decision of *Pennoyer v. Neff*. . . . The potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against him provided only that he is afforded an opportunity to defend himself. We have held that this is a fair rule of law as between a resident injured party . . . and a non-resident motorist, and that the requirements of due process are

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[226] *Armstrong*, 423 A.2d at 176.

[227] *See* Shaffer v. Heitner, 433 U.S. 186, 202-03 (1977).

[228] *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011) (plurality opinion).

[229] *Shaffer*, 433 U.S. at 203 (quoting Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930)).

[230] Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

> therefore met. But to conclude from this holding that the motorist, who never consented to anything and whose consent is altogether immaterial, has actually agreed to be sued . . . is surely to move in the world of Alice in Wonderland.[231]

Even if the Delaware General Assembly were not aware of this authoritative rejection of implied consent, the Delaware Supreme Court should have been. As noted above, the Delaware reaction to *Shaffer* was rapid, bordering on hasty.[232] Three of the members of the Delaware bar committee that drafted the statute explicitly characterized Section 3114 as an implied consent statute.[233] The committee understood that predicating jurisdiction on implied consent might be unconstitutional.[234] Furthermore, in their research into other states' approaches, the committee believed that only one of eleven states with director amenability statutes relied on "implied consent" rather than a long-arm approach.[235]

Despite these perceived shortcomings, the Delaware drafters had at least four reasons for explicitly choosing the clearly invalid implied consent approach over a long-arm approach. First, and probably strongest, was their concern that simply serving as a director of a pseudo-domestic corporation would be insufficient to establish the minimum contacts necessary for personal jurisdiction under a long-arm statute.[236] Two committee members seem to have had this view.[237] Obviously, that concern was well founded, given *Shaffer*'s explicit rejection of the assertion that service as a director, *vel non*, and in the absence of an amenability statute, was sufficient.[238]

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[231] Olberding v. Ill. Cent. R. Co., 346 U.S. 338, 340-41 (1953) (citations omitted). *See also* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 ("In a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations.").

[232] *See supra* note 116. However, it is clear that the Delaware bar, and more pertinently, the General Corporation Law Committee, knew that *Shaffer* would be decided by the end of the October Term and that invalidation of the sequestration statute was a distinct possibility. *See* Jacobs, *supra* note 111, at 696-97. It is surely plausible that the Committee members had engaged in at least informal discussions about the response Delaware should take. *See* Stargatt, *supra* note 119, at 223.

[233] *See* Jacobs & Stargatt, *supra* note 119, at 701; Ward, *supra* note 119, at 13-14.

[234] *See* Jacobs, *supra* note 111, at 696.

[235] *See* Ward, *supra* note 119, at 13.

[236] *See infra* notes 237-38 and accompanying text.

[237] *See* Jacobs, *supra* note 111, at 692; Ward, *supra* note 119, at 8. Mr. Jacobs (now Justice Jacobs) and Mr. Ward were members of the General Corporation Law Committee of the Delaware State Bar Association, which was charged with drafting the statute; Mr. Ward served as Vice Chair at the time. *See* Jacobs, *supra* note 111, at 692; Ward, *supra* note 119, at 1.

[238] *See* Shaffer v. Heitner, 433 U.S. 186, 215-16 (1977).

Second, Ernest Folk, III, a preeminent scholar of Delaware corporate law, had suggested that Delaware consider a consent statute to replace the sequestration scheme.[239] Third, the constitutionality of Connecticut's director-consent statute had been upheld in their courts.[240] Finally, *Shaffer* cited, as examples, three implied consent statutes.[241] Most likely, however, Justice Marshall was simply noting that Delaware, unlike a few other states, had no amenability statute explicitly covering directors. In fact, at the time Delaware had no long-arm statute at all. He was not, however, insisting that such a statute must, or should, be based on implied consent.[242]

Yet the Delaware courts, thanks to *Armstrong*, persist in rooting personal jurisdiction over nonresident directors under Section 3114 in the notion of "implied consent."[243] For instance, Chancellor Allen, in two of his opinions in *Carlton Investments*, makes clear that Section 3114 jurisdiction is via implied consent, even though the Chancellor claims to root jurisdiction in notions of foreseeability.[244] Other Delaware Court of Chancery judges have also fallen into this error.[245] Any doubt that the judges of the Delaware Court of Chancery interpret Section 3114 as truly based on implied consent should be put to rest by a recent law review article, co-authored by the current Chancellor and his predecessor.[246]

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[239]Ward, *supra* note 119, at 13-14 (citing Folk & Moyer, *supra* note 92, at 798-99) (urging the Connecticut statute, which "recites that election or service as a director acts as consent to the jurisdiction of the Connecticut courts," as a model for Delaware).

[240]*See* Ward, *supra* note 119, at 14. *But see* Weil v. Beresth, 225 A.2d 826, 827 (Conn. Super. Ct. 1966) (upholding the statute at a trial level court without elaboration and in one short paragraph). Also, a United States District Court had upheld the South Carolina implied consent statute, though that case had been decided over two decades before Section 3114 was adopted, long before the Debtors' Rights Revolution. *See* Wagenberg v. Charleston Wood Prods., 122 F. Supp. 745, 749 (E.D.S.C. 1954).

[241]Ward, *supra* note 119, at 14 (citing to *Shaffer*, 433 U.S. at 216 n.47).

[242]*See Shaffer*, 433 U.S. at 216.

[243]The Supreme Court of Delaware revisited and reaffirmed the constitutionality of personal jurisdiction under Section 3114 in *Sternberg v. O'Neil* in 1988. Sternberg v. O'Neil, 550 A.2d 1105, 1125 (Del. 1988). Further, and more pertinently, the opinion reiterates the assertion in *Armstrong* that Section 3114 works by implied consent. *Id.* at 1116 n.20.

[244]*See* Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc., 1996 WL 608492, at *5 (Del. Ch. Oct. 16, 1996); Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc., 1995 WL 694397, at *9 (Del. Ch. Nov. 21, 1995).

[245]*See* Technicorp Int'l II, Inc. v. Johnston, 2000 WL 713750, at *4 (Del. Ch. May 31, 2000), *reprinted in* 26 DEL. J. CORP. L. 689, 694 (2001); *see also* Feeley v. NHAOCG, LLC, 2012 WL 966944, at *4, *6 (Del. Ch. Mar. 20, 2012) (finding the LLC analogue to Section 3114 was a valid implied consent statute); Hamilton Partners, L.P. v. Englard, 11 A.3d 1180, 1199 (Del. Ch. 2010) (asserting personal jurisdiction over defendants based on their capacities as directors).

[246]*See* Chandler & Strine, *supra* note 167, at 1003.

3. Validating Section 3114 on a Theory of Actual Consent

Another interpretation claims that Section 3114 is valid because serving as a fiduciary is actual consent to personal jurisdiction. Actual consent, of course, comports with due process without a minimum contacts analysis.[247] A general statement of this argument would run as follows: Where a state's amenability statute predicates personal jurisdiction upon a defendant taking action *X*, and where potential defendants are sufficiently sophisticated that they should know that the state predicates personal jurisdiction on action *X*, then a defendant who does action *X* actually consents to personal jurisdiction.[248]

Applying that analysis specifically to Section 3114 would claim that the statute predicates personal jurisdiction in fiduciary duty litigation upon a defendant serving as a fiduciary. Delaware fiduciaries, at least in the public company setting, are sufficiently sophisticated that they should know that Delaware considers service as a fiduciary to be actual consent to jurisdiction in fiduciary duty cases.[249] Thus, people who serve as fiduciaries give actual consent to personal jurisdiction in fiduciary duty cases.[250]

Note that this claim is different from the claim, which the Delaware courts frequently make, that fiduciaries should foresee that they may be sued in Delaware and because of that foreseeability Section 3114 meets due process.[251] The foreseeability theory is part of the *International Shoe* approach, which looks at minimum contacts or at least fairness and reasonableness.[252] Actual consent is valid without any other analysis,[253] though, of course, actual consent may be considered fair and reasonable as well. The claim I currently examine is that fiduciaries actually consent to

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[247] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) (quoting Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982)) (noting that "because the personal jurisdiction requirement is a waivable right, there are a 'variety of legal arrangements' by which a litigant may give 'express or implied consent to the personal jurisdiction of the court'").

[248] A potential condition of this general argument would limit it to situations where the state has a strong interest in the kind of litigation covered by the amenability statute. *See supra* notes 213-17 and accompanying text.

[249] *See supra* notes 127-30 and accompanying text.

[250] Delaware has frequently asserted its strong interest in fiduciary duty litigation through its manifest concern with the governance of its corporations, protecting its corporations' shareholders, and ensuring a forum for the correct application of its corporate law. *See supra* note 214 and accompanying text.

[251] *See supra* notes 209-212 and accompanying text.

[252] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[253] *See supra* note 247 and accompanying text.

personal jurisdiction when they serve as fiduciaries because they should know that Delaware law so provides.

One serious shortcoming in this argument is that Delaware courts have not yet asserted it. Whether this is because judges disagree with the claim or whether they have simply thought the assertion to be unnecessary in light of the other theories in support of Section 3114 is unknown. Surely *Armstrong* could have made exactly this claim, but it did not.[254] The Court of Chancery judges could have supplemented *Armstrong*'s reasoning by holding that Section 3114 is valid because it is based upon actual consent, but they have not done so.[255] Their failure to make this argument does not estop them from doing so in the future, but it does suggest that the Delaware judiciary has never believed that Section 3114 is based upon actual consent, which would seem to undercut greatly any such argument they might make now.

Other flaws are fatal to the argument that Section 3114 is based on actual consent. The first is the assertion that actual consent can arise from constructive notice of what one is consenting to.[256] Even if one takes the view that every Delaware fiduciary should know that Delaware considers service as a fiduciary to be actual consent to personal jurisdiction, at least some fiduciaries will not know that fact. Those fiduciaries' decision to serve as a fiduciary cannot be actual consent to jurisdiction, but could only be implied consent.[257] As to those defendants personal jurisdiction under Section 3114 cannot attach.[258]

Practical considerations also affect this argument. The number of Delaware fiduciaries who are unaware that Delaware considers service as a fiduciary to be actual consent is unknowable. Certainly applying Section 3114 in this fashion will result in considerable litigation expense as each fiduciary defendant is deposed to establish whether he or she had actual knowledge of Delaware's laws. Furthermore, the level of awareness that constitutes sufficient knowledge to satisfy due process would be a very open question, one that would keep the Delaware courts busy for quite some time. In the end, constructive knowledge of Delaware's position is not actual

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[254] *See* Armstrong v. Pomerance, 423 A.2d 174, 176 (Del. 1980) (holding instead that "the jurisdictional question must be answered by reference to the quality and nature of such [minimum] contacts").

[255] *See generally* Winship, *supra* note 30 (arguing that implied consent is an insufficient basis for personal jurisdiction over nonresident corporate officers and offering a solution to the problem: "a movement from implied to express consent").

[256] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[257] *See supra* notes 117-19 and accompanying text.

[258] *See supra* notes 138-46 and accompanying text.

consent but is, at best, foreseeability, which is insufficient to establish personal jurisdiction.[259]

A second fatal flaw would render Section 3114 ineffective under the actual consent theory, even if every Delaware fiduciary had actual notice that Delaware asserts personal jurisdiction via Section 3114 over all fiduciaries. That flaw is the conclusion that "doing action *X* constitutes actual consent to personal jurisdiction." In some instances this conclusion is true, as for example where the defendant explicitly consents or agrees to personal jurisdiction.[260] Where the defendant enters a general appearance knowing that the consequence is personal jurisdiction, taking such action constitutes actual consent.[261]

In other instances this conclusion is not true. For example, suppose the action *X* of Section 3114 were not serving as a fiduciary, but wearing tennis shoes. Suppose further that every Delaware fiduciary had actual knowledge that Delaware will claim personal jurisdiction in fiduciary duty litigation over any fiduciary who wears tennis shoes. Would a fiduciary who chooses to wear tennis shoes really be giving actual consent to personal jurisdiction? Of course not. Or suppose the fiduciary said (or emailed the corporation or the Delaware Secretary of State) "I am about to wear tennis shoes, but I do not thereby consent to personal jurisdiction under Section 3114." Again, the fiduciary would not be giving actual consent. Simply being a fiduciary to a Delaware corporation, without any other ties to the state, is as non-consequential to personal jurisdiction as choosing to put on tennis shoes.

Any action other than actual consent can validly support personal jurisdiction only where it is so related to the underlying cause of action or the litigation that due process is satisfied.[262] This, of course, is simply another way of saying that any act purportedly giving rise to personal jurisdiction (other than actual consent, domicile, and presence in the jurisdiction when personal service is effected) must meet *International Shoe* as most recently interpreted by *Nicastro*.[263] The point is that only actual consent is actual consent; everything else is implied consent.[264]

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[259] *See infra* note 279-82 and accompanying text.

[260] *See* Winship, *supra* note 30, at 30.

[261] *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 186-87, 196 n.12 (1977). Where the defendant enters a general appearance without understanding that the consequence is personal jurisdiction, the defendant has not actually consented. Rather, the defendant is estopped. *See infra* note 411.

[262] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[263] *See infra* notes 448-51 and accompanying text.

[264] Or, it may be estoppel. *See infra* note 411 and accompanying text.

Returning to Section 3114, serving as a fiduciary of a Delaware corporation, even with knowledge of Section 3114, is not actual consent to personal jurisdiction.[265] Serving as a fiduciary of a Delaware corporation only results in personal jurisdiction if the fiduciary has the requisite contacts with Delaware or it would be fair and reasonable to assert jurisdiction.[266] It is to that question that I now turn.

IV. *NICASTRO* RE-ENFORCES SECTION 3114'S INVALIDITY

The Supreme Court's 2011 opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*[267] leaves no doubt that Delaware violates the Constitution when it asserts personal jurisdiction over fiduciaries under Section 3114.[268]

The fact paradigm in *Nicastro* might seem to be different from that of the typical Section 3114 case. *Nicastro* was a stream-of-commerce case, a chain of commercial transactions in which a product moves from manufacturer through oftentimes numerous intermediaries to the ultimate consumer and injures a human.[269] Section 3114 cases involve actions, usually collective, that are not in themselves of a commercial nature; no products are manufactured, sold, or purchased.[270] Section 3114 cases do not involve a chain of transactions or intermediaries.[271] Defendant's liability in *Nicastro* depended upon products liability doctrines, presumably negligence and strict liability.[272] Fiduciaries of Delaware corporations are not liable for breaches of their fiduciary duties unless they act intentionally or at least with gross negligence.[273] However, the settings are similar because the intent required for fiduciary liability is typically not one that requires mens rea, and so is unlike most intentional torts.[274]

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[265] *See supra* Part III.A.

[266] Assuming the fiduciary is neither a Delaware domiciliary nor has the misfortune to be in Delaware when personal service is effected. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[267] 131 S. Ct. 2780 (2011).

[268] *See id.* at 2788 (2011) (analyzing stream of commerce metaphor).

[269] *See id.* at 2786.

[270] *See* DEL. CODE ANN. tit. 10, § 3114 (2009).

[271] *See, e.g.*, Armstrong v. Pomerance, 423 A.2d 174, 174-75 (Del. 1980) (transacting "no business in Delaware other than the minimum necessary to maintain its status as a Delaware corporation").

[272] *Nicastro*, 131 S. Ct. at 2786 (arising out of products liability suit filed in New Jersey for injury sustained while using metal-shearing machine).

[273] *See* McPadden v. Sidhu, 964 A.2d 1262, 1274 (Del. Ch. 2008).

[274] *See infra* notes 334-41 and accompanying text (discussing intent required for violation of fiduciary duties).

"[This] case," Justice Kennedy wrote in *Nicastro*, "presents an opportunity to provide greater clarity."[275] Regrettably, the Court squandered it. "Those who cannot remember [*Asahi*] are condemned to repeat it," as Santayana might have said.[276] Without belaboring the *Asahi* opinion, the Court fractured over which aspect of the *International Shoe* minimum contacts test was the core inquiry.[277] On the one hand, part of the test requires that the defendant have minimum contacts in the sense of having undertaken "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State."[278] On the other hand, some language in *World-Wide Volkswagen* suggested that minimum contacts would be met where "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[279] Justice O'Connor, speaking for four Justices, emphasized the first aspect:

> Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. . . . The "substantial connection," . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*. . . . But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.[280]

Justice Brennan, also speaking for four Justices, emphasized the second aspect:

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[275] *Nicastro*, 131 S. Ct. at 2788, 2786.

[276] GEORGE SANTAYANA, 1 THE LIFE OF REASON 284 (1905).

[277] *Compare* Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 116 (1987) (examining the international context, burden on foreign defendant and slight interests of plaintiff in forum state), *with id.* at 121 (Brennan, J., concurring) (examining the regular and extensive sales made of final product in California). The only legal proposition that garnered a majority of the Court was that California's assertion of personal jurisdiction would be unreasonable and thus would not comport with *International Shoe*'s requirement that jurisdiction does not offend traditional notions of fair play and substantial justice. *Id.* at 113-14.

[278] Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[279] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[280] *Asahi Metal Indus.*, 480 U.S. at 109, 112 (citations omitted).

> Under [Justice O'Connor's] view, a plaintiff would be required to show "[a]dditional conduct" directed toward the forum . . . . I see no need for such a showing, however. . . . As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant . . . benefits economically from the retail sale . . . in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. . . . [W]hen a corporation may reasonably anticipate litigation in a particular forum, it cannot claim that such litigation is unjust or unfair.[281]

Nicastro, a stream-of-commerce case like *Asahi*, split the Court along the same intellectual lines.[282] Justice Kennedy's plurality opinion emphasized Justice O'Connor's view:

> [A]s a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State. . . . [J]ustice Brennan's concurrence [in *Asahi*], advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment. . . . The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign . . . .[283]

In contrast, Justice Ginsburg's dissent, joined by two other Justices, outran Justice Brennan's understanding of personal jurisdiction to embrace a conception based on reasonableness and fairness:

> The modern approach to jurisdiction . . . ushered in by *International Shoe,* gave prime place to reason and fairness. Is

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[281] *Id.* at 117, 119 (Brennan, J., concurring) (citations omitted).

[282] In fact, the parallels between the division of opinions in *Asahi* and that in *Nicastro* are so striking that one is tempted to think of the *Nicastro* court as split into Team Sandra, Team William, and Team John Paul. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (plurality opinion); *Asahi Metal Indus.*, 480 U.S. 102.

[283] *Nicastro*, 131 S. Ct. at 2788-89.

> it not fair and reasonable . . . to require the [defendant] to defend at the place its products cause injury? Do not litigational convenience and choice-of-law considerations point in that direction? On what measure of reason and fairness can it be considered undue to require [defendant] to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States? Is not the burden on [defendant] to defend in New Jersey fair, *i.e.,* a reasonable cost of transacting business internationally, in comparison to the burden on [plaintiff] to go to Nottingham, England to gain recompense for an injury he sustained using [defendant]'s product at his workplace in . . . New Jersey?[284]

Justice Ginsburg further argued, "[t]he plurality objects to a jurisdictional approach 'divorced from traditional practice.' But 'the fundamental transformation of our national economy,' this Court has recognized, warrants enlargement of 'the permissible scope of state jurisdiction over foreign corporations and other nonresidents.'"[285]

Even though, as *Nicastro* vividly illustrates, the current United States Supreme Court justices are deeply divided on some of the most basic tenets of personal jurisdiction, I believe the Court would easily, and possibly unanimously, strike down Section 3114.

A. *The* Nicastro *Plurality Would Invalidate Section 3114*

The four Justices in the plurality would find that Section 3114 violates the Due Process Clause. In those Justices' view, the core of the due process requirement is that a defendant intends actions to take place in, or to have an important effect within, the forum state.[286] Those actions show the defendant's intent to connect with, or establish contacts with, the forum state in some important way.[287] The actions or effects must be real life actions with social or economic consequences, not simply abstract, metaphysical, or formalistic contacts.[288] The actions or effects must be real life actions with

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[284] *Id.* at 2800-01 (Ginsburg, J., dissenting) (footnotes omitted).

[285] *Id.* at 2801 n.9 (Ginsburg, J., dissenting) (citation omitted) (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957)).

[286] *See supra* notes 282-85 and accompanying text.

[287] *See* J. McIntyre Mach., v. Nicastro, 131 S. Ct. 2780, 2788 (2011) (plurality opinion).

[288] *See id.*

social or economic consequences, not simply abstract, metaphysical, or formalistic contacts.[289] The defendant must desire the action, not simply anticipate or expect it.[290] "This Court's precedents make clear that it is the defendant's actions, not his [or her] expectations, that empower a State's courts to subject him [or her] to judgment."[291]

As least as important as the emphasis on actions and intent, rather than passive expectations, is the plurality's distinct understanding that the defendant must intend that the requisite events occur *in the forum*.[292] Defendants are subject to specific personal jurisdiction "through contact with and activity directed at" the forum.[293] Where, as in stream-of-commerce cases, the actions are attenuated from the forum, jurisdiction exists "only where the defendant can be said to have targeted the forum."[294]

Furthermore, the defendant must target the particular forum state for his or her actions. Simply interacting with a geographic area generally, or the United States as a whole, is insufficiently focused for due process.[295] Justice Scalia, a member of the plurality, epitomized the flaw of the contrary rule, a rule that seemed to find favor with the dissenters, when he said "I mean, availment doesn't mean much if that's all it means."[296]

The targeted actions must be directed to the forum's social fabric or its business, not to the forum in a formal or nominal way. The defendant must "follow[] a course of conduct directed at the society or economy existing within the jurisdiction."[297]

Delaware judges candidly admit that fiduciary actions do not occur in Delaware. "[T]he stockholders of Delaware companies are widely dispersed and . . . the effects on them of breaches of duty track their locations, not that of the company's headquarters."[298] "[T]he acts or omissions of [a fiduciary] cannot be said to occur within this state merely because the corporation is

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[289] *See id.* at 2789.

[290] *Id.* at 2788 ("The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.").

[291] *Nicastro*, 131 S. Ct. at 2789.

[292] *See id.* at 2787 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)) (stating that specific jurisdiction is appropriate "for disputes that 'arise out of or are connected with the activities within the state'").

[293] *Id.* at 2788.

[294] *Id.*

[295] *See Nicastro*, 131 S. Ct. at 2790.

[296] Transcript of Oral Argument at 27-28, J. McIntyre Mach., v. Nicastro, 131 S. Ct. 2780 (2011) (No. 09-1343) (responding to hypothetical that manufacturer who distributes product internationally has purposefully availed himself of the market in every state in the United States).

[297] *Nicastro*, 131 S. Ct. at 2789.

[298] Chandler & Strine, *supra* note 167, at 1004.

domiciled here."[299] Yet they continue to uphold personal jurisdiction under Section 3114.

Being a director is not "conducting activities" within Delaware, at least for purposes of pseudo-domestic corporations. In the first place, and most literally, board meetings are not typically held in Delaware, since the Delaware General Corporation Law does not require in-state meetings.[300] Most Delaware foreign corporations will prefer to hold board meetings at the corporation's principal office or other convenient location.

Second, and more metaphysically, a fiduciary's actions rarely involve any component that requires any activity to occur in Delaware.[301] The most frequent action a Delaware corporation takes in Delaware is filing the annual franchise tax report, and this is not nearly sufficient to qualify the fiduciaries for personal jurisdiction.[302] The *Nicastro* plurality reaffirms the established Supreme Court standards for personal jurisdiction—standards that have been ignored in Delaware.[303] If the Delaware courts undertook a real due process analysis of Section 3114 in light of *Nicastro* they would find no minimum contacts.

For example, the *Shaffer* Court rejected plaintiff's argument that simply being a director satisfies *Hanson*:

> But . . . this line of reasoning establishes only that it is appropriate for Delaware law to govern the obligations of [the directors] to Greyhound and its stockholders. It does not demonstrate that [the directors] have "purposefully avail[ed themselves] of the privilege of conducting activities within the forum State," . . . in a way that would justify bringing them before a Delaware tribunal. [The directors] have simply had nothing to do with the State of Delaware.[304]

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[299] *In re* USACafes L.P. Litig., 600 A.2d 43, 52 n.5 (Del. Ch. 1991).

[300] DEL. CODE ANN. tit. 8, § 141(g) (2010).

[301] Only certain filings with the Secretary of State require that action (i.e. the filing) occur in Delaware. *See*, *e.g.*, *id.* § 101 (forming a subsidiary); *id.* § 133 (changing the registered office or agent); *id.* §§ 242, 245(d) (amending or restating the Certificate of Incorporation); §§ 151(g), 243(b) (reporting the provisions of stock issued under a blank check provision, or retiring treasury stock); *id.* § 251(c) (certificate of merger); *id.* § 275(d) (certificate of dissolution).

[302] *See id.* § 502(a).

[303] *See* Section IV and accompanying text.

[304] Shaffer v. Heitner, 433 U.S. 186, 216 (1977) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

In the very next term, the Court had occasion to describe a setting in which a defendant did not purposefully avail himself of the benefits and protection of the forum state:

> The "purposeful act" . . . was [the defendant/father] "actively and fully consent[ing] to Ilsa living in California for the school year and sending her to California for that purpose." . . . A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have "purposefully availed himself" of the "benefits and protections" of California's laws.[305]

Surely the father in *Kulko* did more vis-à-vis California than a typical nonresident director of a Delaware corporation does vis-à-vis Delaware, yet the Delaware courts continue to find minimum contacts.[306]

Another pre-*Armstrong* case, *Rush v. Savchuk*,[307] also shows that a fiduciary does not meet the "purposefully avails" test simply by being a fiduciary.[308] Rush was a motorist involved in an accident in Indiana, but suit was brought against him in Minnesota.[309] Rush's only connection with the forum state was that his insurance company did business (though was not incorporated) there.[310] Again, the Court held that no personal jurisdiction existed because the defendant did not meet the *Hanson* test.[311] Substitute a fiduciary for Rush and a Delaware corporation for Rush's insurance company and it is clear that the director has not purposefully availed himself or herself by conducting activities in Delaware. But again, Delaware does not even try to distinguish *Rush*, let alone apply it.[312]

Even if serving as a fiduciary is purposefully conducting activities within Delaware, it is hard to see how that "invoke[s] the benefits and

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[305] Kulko v. Superior Court, 436 U.S. 84, 94 (1978) (quoting Kulko v. Superior Court of the City and Cnty. of S.F., 19 Cal.3d 514, 524 (1977); Shaffer v. Heitner, 433 U.S. 186, 216, 228 (1977))).

[306] *See, e.g.*, Armstrong v. Pomerance, 423 A.2d 174, 176 (Del. 1980) (merely citing *Kulko*, 436 U.S. at 93-94).

[307] 444 U.S. 320 (1980).

[308] *See id.* at 332-33.

[309] *Id.* at 322

[310] *Id.* at 322 & n.4.

[311] *Rush*, 444 U.S. at 328-29.

[312] *See e.g.*, Armstrong v. Pomerance, 423 A.2d 174, 176 (Del. 1980) (merely citing *Rush*, 444 U.S. at 327).

protections of" Delaware law, as required under *Hanson*.[313] *Kulko* fleshes out what the Court had in mind. The *Kulko* Court expressly viewed this aspect of the *Hanson* formulation as requiring some intention on the part of the defendant to obtain them.[314] The Court held the forum state's "police and fire protection, its school system, its hospital services, its recreational facilities, its libraries and museums"[315] were insufficient because they were "benefits to the child, not the father, and *in any event were not benefits that appellant purposefully sought for himself*."[316] Likewise, the fact that the father received a financial benefit in the form of reduced expenses when his child lived in the forum state was not a benefit from the forum state for *Hanson* purposes, because the defendant "did not *purposefully derive benefit* from any activities relating to the" forum.[317]

What benefits and protections do fiduciaries derive from Delaware? The Delaware courts can point to only three: the possibility of a loan from the corporation, the possibility of being indemnified by the corporation, and the power to manage the corporation.[318] All three of these are only indirectly provided by Delaware law. That is, Delaware law allows the creation of corporations and endues them with these attributes. Only one of these, the power to manage the corporation, could in any real sense be said to be a benefit that a director intentionally seeks. Getting a loan from the corporation and being indemnified when sued are at best only byproducts of being a director. To say that any of these things occur in Delaware or to say that they arise out of action in Delaware is to stretch the idea of location beyond the breaking point.

The fairness that goes into "fair play and substantial justice" is measured by the defendant's intentional contacts with the forum, not by notions of litigational fairness in which the interests of the plaintiffs and the forum have equal force. Those interests can be considered, but do not create jurisdiction where the defendant's intentional contacts are insufficient. "[J]urisdiction is in the first instance a question of authority rather than fairness . . . ."[319]

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[313]Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[314]Kulko v. Superior Court, 436 U.S. 84, 101 (1978).

[315]*Id.* at 94 n.7 (quoting Kulko v. Superior Court, 19 Cal.3d 514, 522 (1977)).

[316]*Id.* at 94 n.7 (emphasis added).

[317]*Id.* at 96 (emphasis added).

[318]Armstrong v. Pomerance, 423 A.2d 174, 176 n.4 (Del. 1980) (citing DEL. CODE ANN. tit. 8, §§ 141(a), 143, 145 (2010)).

[319]J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011) (plurality opinion).

> [W]ere general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant's interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum. That such considerations have not been deemed controlling is instructive.[320]

Of particular relevance to the validity of Section 3114, the plurality rejected the argument that jurisdiction existed because the forum has a strong interest in protecting its citizens from the harm involved in the lawsuit.[321] Court of Chancery judges have frequently validated jurisdiction under Section 3114 on the ground that Delaware has a strong interest in protecting shareholders of Delaware corporations from breach of fiduciary duties.[322]

This argument is even weaker in the shareholder litigation setting because less than a handful of every thousand shareholders are likely to be Delaware residents.[323] Moreover, the plaintiffs are only injured indirectly. The true victim of a fiduciary breach is the corporation itself. Any monetary recovery goes to the corporation, not the shareholders, and they have no right to insist that a recovery is passed along to them in the form of a dividend. On any realistic social and economic characterization, a Delaware pseudo-domestic corporation is located where its corporate headquarters or principal place of business is located. It is not located in Delaware in any but the most attenuated sense.

Furthermore, the state of Delaware is not even indirectly affected by a fiduciary breach at one of its pseudo-domestic corporations. Delaware does not assess an income tax on corporations that do not conduct business

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[320] *Id.*

[321] *Id.* at 2791 (holding that New Jersey's interest "is doubtless strong, but the Constitution commands restraint before discarding liberty in the name of expediency").

[322] *See supra* notes 213-217 and accompanying text.

[323] Delaware has 0.3% of the nation's population. The percentage of U.S. stockholders who are Delaware residents may possibly be slightly higher than 0.3% because the state ranks slightly above the median in both personal income per capita and household income. *See Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2011*, U.S. CENSUS BUREAU, tbl.1 (2011), *available at* http://www.census.gov/popest/data/state/totals/2011/tables/NST-EST2011-01.csv; *Household Income – Distribution by Income Level and State: 2009*, U.S. CENSUS BUREAU, tbl.706 (2012), http://www.census.gov/compendia/statab/2012/tables/12s0706.pdf; *Personal Income Per Capita in Current and Constant (2005) Dollars by State: 1980 to 2010*, U.S. CENSUS BUREAU, tbl.681 (2012), *available at* http://www.census.gov/compendia/statab/2011/tables/11s0680.pdf.

there.[324] Rather, Delaware gets revenues from its corporations by an annual franchise tax, which is not based on income.[325] Delaware does not benefit economically in any way from a plaintiff's victory in a fiduciary duty suit involving a pseudo-domestic corporation.

A related interest, which Delaware has long claimed, is in "defining, regulating and enforcing the fiduciary obligations which directors of Delaware corporations owe to such corporations and the shareholders who elected them."[326] No one disagrees with that proposition, but *Shaffer* and *Nicastro* are both clear that Delaware's interest goes to the question of choice of law, not personal jurisdiction.[327] "A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts."[328]

The plurality tentatively suggested that an exception to the "purposefully avails" requirement might exist where the defendant is alleged to have committed an intentional tort.[329] An intentional tort might confer power to exercise personal jurisdiction over a defendant, "by reason of his attempt to obstruct its laws."[330] That off-hand dictum in the plurality might suggest that Section 3114 and the more general long-arm statute, Section 3104(c), are permissible.

Even if this cryptic suggestion were true and were the holding, it is unlikely that Delaware could rest a fiduciary amenability statute on it. First, what Delaware case law exists on the subject rejects analogizing a fiduciary's breach of fiduciary duties to an intentional tort, because the prophylactic nature of fiduciary duties means that liability can be established without a showing of damage or causation.[331] Vice Chancellor Laster, in a considered

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[324] DEL. CODE ANN. tit. 30, § 1903 (2009).

[325] DEL. CODE ANN. tit. 8, § 503 (2010).

[326] Armstrong v. Pomerance, 423 A.2d 174, 179 n.8 (Del. 1980) (quoting the synopsis to 61 Del. Laws 119 (July 7, 1977)); *see also In re* USACafes, L.P. Litig., 600 A.2d 43, 51 (Del. Ch. 1991) (asserting that Delaware has a strong interest in relation to corporations and limited partnerships organized under its laws); Actrade Fin. Techs. Ltd. v. Aharoni, 2003 WL 25575794, at *9 (Del. Ch. Oct. 17, 2003) (referring to Delaware protecting its companies from directors' breaches of fiduciary duties).

[327] *See* Shaffer v. Heitner, 433 U.S. 186, 215 (1977) (citing Hanson v. Denckla, 357 U.S. 235, 254 (1958)).

[328] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2790 (2011) (plurality opinion).

[329] *Id.* at 2785.

[330] *Id.* at 2787.

[331] *See, e.g.*, Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 370-71 (Del. 1993); Universal Studios Inc. v. Viacom Inc., 705 A.2d 579, 594 (Del. Ch. 1997). *See also* J. Travis Laster & Michelle D. Morris, *Breaches of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 DEL. L. REV. 71, 96 (2010) ("The [Delaware] cases . . . appear to treat breach of fiduciary duty claims as distinct from common law tort or contract claims.").

and nuanced academic discussion, concludes that, in Delaware, a breach of fiduciary duty is not a common law tort as ordinarily understood.[332] Other academics agree with that assessment.[333]

Second, if a breach of fiduciary duty is a tort, it would not fall under the *Nicastro* hypothetical exception because liability in Delaware usually lacks the required intent. Section 1 of the Restatement (Third) of Torts defines "intent" as either having the purpose of producing a consequence, or having the knowledge that a consequence is substantially certain to occur.[334] In the sense of that definition, of course, an "intentional tort" is one that is not based on negligence, strict liability, or vicarious liability. Liability for physical harm, which the *Nicastro* plurality presumably meant by "intentional tort," requires only this kind of intent.[335] But in Section 5, the Restatement goes on to explain that the intent required for liability for economic harm, including fiduciary duty breaches, requires more.[336] Liability for causing economic harm requires "that the defendant's conduct is not only intentional but also 'improper' or wrongful by some measure."[337]

Liability for breach of fiduciary duty typically does not require the state of mind necessary for an "intentional tort" under the *Nicastro* exception because Delaware law imposes liability for actions involving less culpable states of mind than required under the Restatement. In fact, only gross negligence is required to violate the duty of care.[338] In general, duty of loyalty claims under Delaware law require only intent consonant with the Restatement's definition in Section 1.[339] Delaware law requires something additional, akin to "improper or wrongful by some measure," only when asserting a failure to monitor or other bad faith claim, not for typical duty of

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[332] *See* Laster & Morris, *supra* note 331, at 96-97 (advocating for the revival of the "equitable tort" conception of breach of fiduciary duties, which is currently moribund and can impose liability without scienter).

[333] *See, e.g.*, Marcel Kahan & Edward B. Rock, *When the Government is the Controlling Shareholder*, 89 TEX. L. REV. 1293, 1327 (2011) (citations omitted) ("As a historical matter, breach of fiduciary duty is not a tort. . . . As a conceptual matter, it is also pretty clear that breaches of fiduciary duties are not torts, at least not in the common law use of that term, although they may be 'civil wrongs.'").

[334] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (2010).

[335] *See id.* § 5.

[336] *See id.* § 5 cmt. a.

[337] *Id.*

[338] *See* Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985).

[339] *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006); *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 753-55 (Del. Ch. 2005), *reprinted in* 31 DEL. J. CORP. L. 349, 421-23 (2006).

loyalty claims.[340] Failure to monitor claims will seldom be successful because they are arguably the most difficult to prove.[341]

The intent required for most breach of fiduciary duty actions in Delaware also means they will not meet the most cryptic part of the plurality's exception. The stated reason why intentional torts might be an exception to the "purposefully avail" test is because the defendant intends to "obstruct [the forum's] laws."[342] Whatever else this means,[343] it must require some intent or awareness that the defendant's actions transgress the forum's laws. Again, this requirement would eliminate most Delaware fiduciary claims except possibly in the bad faith context, a narrow subset of the duty of loyalty.

B. *The* Nicastro *Dissent Would Invalidate Section 3114*

Justice Ginsburg, author of the *Nicastro* dissent, would also invalidate Section 3114 even though her conception of specific personal jurisdiction is different from the mainstream conception of the plurality. She sees "fair play and substantial justice," which she epitomizes as "fair and reasonable," as the core value from *International Shoe*.[344] More concretely she states that specific jurisdiction is appropriate when the forum has a sufficient "affiliation" with the dispute.[345]

"Fair and reasonable" seems to comprise at least litigational convenience, meaning the convenience of the witnesses, ease of taking evidence, and the ease of making choice of law decisions.[346] Fair and reasonable also includes whether the plaintiff is a forum resident (at least in personal injury stream-of-commerce cases like *Nicastro*) injured by a nonresident defendant at one extreme or, at the other extreme, whether the

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[340] *See Stone*, 911 A.2d at 370 (citations omitted) ("[I]mposition of liability [in oversight failure cases] requires a showing that the directors knew that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.").

[341] *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996) ("The theory here advanced is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.").

[342] *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011) (plurality opinion).

[343] Nonresident defendants rickrolling a state's on-line statutes, perhaps? *Compare* Bailey Johnson, *Oregon State Legislature Rick Roll*, CBS NEWS (Apr. 14, 2011, 11:07 AM), http://www.cbsnews.com/8301-504784_162-20053906-10391705.html.

[344] *Nicastro*, 131 S. Ct. at 2804 (Ginsburg, J., dissenting).

[345] *Id.* at 2797-98 (quoting her own opinion for the Court in the companion case of Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)).

[346] *Id.* at 2804.

nonresident defendant's actions are "largely home-based."[347] The location of the injury is an important affiliation between the forum and the controversy in personal injury cases, but only because it bears on the "fair and reasonable" factors, and not because it is a separate consideration.[348]

Amplifying the party-focused affiliations, Justice Ginsburg finds personal jurisdiction to be fair and reasonable where the affiliation between the forum and the defendant is created by the defendant's own actions, such as targeting a jurisdiction for sales, echoing *Keeton*'s[349] admonition that the defendant's affiliating action not be "random, fortuitous, or attenuated."[350] The forum's affiliations with the plaintiff make personal jurisdiction fairer and more reasonable, though they are not required.[351]

Justice Ginsburg emphatically rejects any suggestion that personal jurisdiction can rest on implied consent.[352] In fact, she claims this assertion is one "on which there should be no genuine debate."[353] In this respect she is even more explicitly traditional than the *Nicastro* plurality, which certainly would agree with her on this point.[354]

Justice Ginsburg's personal jurisdiction principles would invalidate Section 3114.[355] First, the convenience of the witnesses points away from Delaware. The plaintiff will not be a percipient witness, since he or she was not directly harmed, and in fact would be unlikely to have any relevant evidence to offer. By definition, the fiduciaries could more conveniently litigate either in their state of residence or, more likely for litigational convenience analysis, in the state or states where the board meetings are held. This is likely to be where the corporation has its headquarters or principal place of business. It certainly is not Delaware.

Likewise, physical evidence in such cases is electronic or paper that can be easily transported anywhere,[356] unlike evidence in tort cases, which

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[347] *Id.*

[348] *See Nicastro*, 131 S. Ct. at 2800 n.10 (Ginsburg, J., dissenting) (quoting Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1167 (1966)).

[349] *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984).

[350] *Nicastro*, 131 S. Ct. at 2801 (Ginsburg, J., dissenting) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

[351] *See id.* at 2803 (citing Calder v. Jones, 465 U.S. 783, 788 (1984)).

[352] *Id.* at 2798, 2799 n.5.

[353] *Id.* at 2797.

[354] *See Nicastro*, 131 S. Ct. at 2787 (observing that a defendant may be subject to personal jurisdiction by explicit consent).

[355] *See supra* notes 346-50 and accompanying text.

[356] *See, e.g.*, Armstrong v. Pomerance, 423 A.2d 174, 174-75 (Del. 1980) (alleging misconduct in transactions involving the repurchase of company stock).

frequently is burdensome to move from its pre-litigational location. Again, Delaware is not more convenient, though admittedly it would seldom be less convenient, than any other location within the United States.

Delaware is not a more convenient forum, nor an otherwise more desirable one, for deciding choice of law questions. Unlike some other substantive areas of law, choice of law in corporate fiduciary duty cases is clear and uniform throughout the United States.[357] Director and officer fiduciary duties are squarely within the internal affairs doctrine and so are determined by the law of the state of incorporation, which is never in doubt,[358] a rule that might well be required under the Commerce Clause.[359] Furthermore, any state has subject matter jurisdiction to decide a fiduciary duty case against the fiduciaries of a Delaware corporation.[360] It just has to use Delaware fiduciary duty law to resolve the dispute.[361] It should go without saying that any judge in any state trial court could correctly find that Delaware corporate law applies to a fiduciary duty suit. No particular expertise is required nor is any discretion involved.[362] Evidence suggests that

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[357] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAW §§ 302(2) cmt. e (1971).

[358] *See id.*

[359] *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987).

[360] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAW § 313 (1971).

[361] *See id.* § 313 cmt. e.

[362] The choice of law litigational convenience question is clearly whether the forum court could decide which state's decisional law applies. The question is not whether the forum court could correctly apply that decisional law. The Delaware judiciary is understandably adamant that it is best able to apply Delaware corporate law, an assertion that has strong evidence to support it. *See* John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1381 (2012); Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?*, 37 DEL. J. CORP. L. 1, 29-31 (2012). An unwarranted, but widespread, extension of that view is that no other state's judges should be allowed to apply Delaware corporate law. *But see* Armour et. al., *supra*, at 1397 (explaining that judges in Silicon Valley and elsewhere are becoming particularly well versed in applying Delaware corporate law); *In re* Topps Co. S'holders' Litig., 924 A.2d 951, 959 (Del. Ch. 2007) ("[T]he United States Supreme Court and the New York Court of Appeals . . . have instructed courts under their purview to accord comity to the courts of a corporation's chartering state."). The *Topps* opinion's author, Chancellor Strine, the head of Delaware's Court of Chancery, expressed this thought in his more typically pungent way, cramming three metaphors into one thought:

> [Strine] warns that there's a danger if other courts start routinely interpreting Delaware law. "People should stay in their own lane," he says, using one of his favorite expressions. "How do you get accountability unless you get the answer from the horse's mouth?" He adds: "We are the Bergdorf Goodman, not the Dollar Store, of corporate law."

Susan Beck, *Tell Us How You Really Feel, Leo*, THE AM. LAW. (Mar. 1, 2012), *available at* http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202542160897&thepage=5&slreturn=1. Accepting that consequence would, of course, mean that no court anywhere could hear a case on any topic where choice of law rules require the court to apply another state's substantive law. That result would be both unworkable and contrary to the notion of judicial comity. Delaware judges

plaintiffs who file fiduciary litigation outside Delaware neither desire nor try to overturn this rule.[363]

A fiduciary duty lawsuit is obviously more analogous to the paradigm of the lawsuit against the defendant whose actions are largely home-based, than to the paradigm of the suit by a local plaintiff injured in-state by a nonresident defendant. Wherever it is that the fiduciaries' actions occur, whether it be at the corporation's headquarters or at another location, they are certainly home-based, rather than occurring in or directed to Delaware. That lawsuit is surely not one in which a local plaintiff sues in his or her state of residence for injuries suffered there.

Once again, an analysis reveals that virtually none of the fiduciaries' actions is aimed toward Delaware. Justice Ginsburg would find that the forum has, at best, an abstract affiliation with the fiduciary, and certainly no affiliation created by the fiduciary.[364] An individual who becomes a corporate fiduciary chooses to affiliate with the corporation, surely not with the state of incorporation. It is unclear whether many fiduciaries know, prior to accepting a fiduciary position, where the corporation is incorporated. The state of incorporation, in turn, may have been decided decades before the fiduciary joined the corporation. It is possible, though by no means certain, that the reasons for choosing to incorporate or reincorporate in Delaware are known, but even when they are, they are unlikely to have any bearing on the fiduciaries' decision to serve.

To state the matter as Justice Ginsburg does, the affiliation between a person's decision to serve as a fiduciary and the corporation's state of incorporation is extremely attenuated. It is probably fortuitous, even if not completely random. The affiliation between Delaware and a fiduciary's decision to serve is absolutely emblematic of the kind of contacts that Justice Ginsburg, relying on *Keeton*, would find too weak to permit Delaware, in reason and fairness, to force fiduciaries to litigate in its courts.[365]

Obviously, no countervailing policy pulls toward jurisdiction by reason of the plaintiff's affiliation with Delaware since there is none until the complaint is uploaded to the register in Chancery. Beyond question, Justice

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routinely find themselves competent to apply another state's substantive law. For example, one of Chancellor Strine's most famous opinions required him to apply New York contract law. IBP, Inc. S'holders' Litig. v. Tyson Foods, Inc., 789 A.2d 14, 54 (Del. Ch. 2001). He undertook an extended choice of law analysis in Am. Int'l Grp., Inc. v. Greenberg, 965 A.2d 763, 817 (Del. Ch. 2009) and found himself fully capable of applying New York law. And Vice Chancellor Laster recently did so, as well. *In re* BankAtlantic Bancorp, Inc. Litig., 824 A.3d 824, 837 (Del. Ch. 2012).

[363] Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 140 (2011).

[364] *See supra* notes 351-53 and accompanying text.

[365] *See supra* note 352 and accompanying text.

Ginsburg rejects the idea that Section 3114 is constitutional because the fiduciaries have implied their consent to service and personal jurisdiction.[366]

Justice Ginsburg's synthesis of the two main *Asahi* opinions is further proof that she would invalidate Section 3114.[367] She conceived the facts important to both opinions as being: a foreign defendant, brought into the forum state by a foreign plaintiff, to litigate over a transaction that took place outside the forum.[368] These salient facts are absolutely analogous to a suit under Section 3114. An out-of-state fiduciary is brought into Delaware by an out-of-state shareholder to litigate over a corporate act that took place outside Delaware.

Finally, Justice Ginsburg noted the importance to the *Asahi* justices of the fact that California, the forum state, could protect its interest in deterring the particular wrongful conduct even without being the forum for the litigation, as long as its substantive law applied to the defendant's actions wherever the litigation was brought.[369] That was clearly the case in *Asahi*,[370] and, as noted above, is clearly the case in Section 3114 actions.[371] Not only does the internal affairs doctrine ensure that Delaware's substantive corporations law will be applied to any fiduciary duty lawsuit, but that law is extremely well developed, making application easier for judges in other forums. Delaware can be assured that its interest in seeing its own law applied, and applied correctly, even to pseudo-domestic corporations, will be recognized.

C. *The* Nicastro *Concurrence Would Invalidate Section 3114*

Justice Breyer agrees with the *Nicastro* plurality that the fundamental test for personal jurisdiction focuses on the defendant's contacts with the particular forum.[372] Under the traditional minimum contacts and purposeful availment approach, jurisdiction exists when those contacts with the forum and the connection of the defendant and the forum with the litigation make

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[366] *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2798 (2011) (Ginsburg, J., dissenting).

[367] *See id.* at 2802-03.

[368] *See id.* at 2803.

[369] *See id.*

[370] Asahi Metal Indus. Co. v. Super. Ct., 702 P.2d 543, 552-53 (Cal. 1985), *rev'd*, 480 U.S. 102, 121 (1987); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 173 (1971) (discussing the law that should be selected for application).

[371] Justice Ginsburg did not mention one other centripetal fact in *Asahi* that suggests that the *Nicastro* dissent would overturn Section 3114: the physical and testimonial evidence was in the forum, unlike a Section 3114 action. *Asahi*, 702 P.2d at 553.

[372] *See Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring).

jurisdiction fair.[373] Justice Breyer does not emphasize any interests of the plaintiff or of the forum in personal jurisdiction questions.

None of the three facts plaintiff adduced was sufficient for personal jurisdiction in Justice Breyer's view, and of those three, only one could apply even by analogy in a Section 3114 case.[374] The defendant wanted its agent to sell its machines to any United States buyers wherever they were located.[375] The rough analogue to a Section 3114 action is that the defendant wants to be a fiduciary of the particular corporation wherever it happened to have its headquarters, regardless of where it is incorporated. Because Justice Breyer found the *Nicastro* contacts insufficient, he would undoubtedly find the fewer contacts in a Section 3114 lawsuit even less compelling.

V. BEYOND *NICASTRO*: THE ADOPTION OF A VALID FIDUCIARY AMENABILITY STATUTE

The Delaware courts could, and should, honestly admit that Section 3114 does not provide amenability over fiduciaries because the implied consent conceit is an invalid fiction. The courts could also read implied consent out of the statute and find that Section 3114 is grounded in director status alone. That approach would turn Section 3114 into a single act long-arm statute.

Delaware courts have unfortunately not taken that road, and the straightforward reading of the statute, as well as the legislative history, is that amenability is predicated on implied consent.[376] Furthermore, reading Section 3114 to be a long-arm statute would do considerable violence to the words of the statute.[377] As it stands then, Section 3114 is an ineffective statute to confer personal jurisdiction over nonresident directors and officers of Delaware pseudo-domestic corporations. Delaware would be better advised to repeal Section 3114 and adopt a new, clearer, constitutional, fiduciary amenability statute.

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[373] *Id.* at 2793.

[374] *Id.* at 2791. The two *Nicastro* facts that are not analogous to a Section 3114 action are that the defendant once sold one machine to a New Jersey customer and defendants' sales representatives attended trade shows in the U.S., but not in New Jersey. *See id*.

[375] *See Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring).

[376] *See supra* notes 243-45 and accompanying text.

[377] *See* DEL. CODE ANN. tit. 10, § 3114(b) (2009).

A. *A Proposed Statute*

Section 3114 cannot constitutionally be based on implied consent and Delaware disclaims personal jurisdiction over fiduciaries based on its other amenability statute.[378] Nor can Section 3114 be validated as actual consent. Furthermore, fiduciaries do not have the requisite minimum contacts with Delaware to support personal jurisdiction under the due process clause.[379] Nor does Delaware have sufficient affiliating circumstances with them to make personal jurisdiction fair and reasonable under due process.[380]

Is any other avenue available to Delaware to assert personal jurisdiction over pseudo-domestic corporations' fiduciaries? Yes. The Delaware General Assembly should adopt an amendment to Section 502(a) of Title 8 of the Delaware Code.[381] That Section provides that every Delaware corporation must file an annual report containing certain information.[382] The information to be filed should be expanded to include:

> A separate signed consent to personal jurisdiction from each director and officer, which consent shall read as follows:
>
> > I hereby consent to the personal jurisdiction of any state court located in Delaware in all civil actions or proceedings brought in Delaware, by or on behalf of, or against the corporation filing this annual report, in any action or proceeding against me for violation of a duty in my capacity as a director or officer, whether or not I continue to serve as a director or officer at the time suit is commenced.

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[378] *See supra* notes 175-78 and accompanying text.
[379] *See supra* notes 193-94 and accompanying text.
[380] *See supra* notes 345-51 and accompanying text.
[381] *See* DEL. CODE ANN. tit. 8, § 502(a) (2010).
[382] *Id.*

> The address at which service of process in any such civil action or proceeding may be delivered to me is [_____].[383]

> The address provided in each consent to personal jurisdiction shall include the street, number, city, country and postal code. Each director and officer shall personally manually execute such consent to personal jurisdiction annually. As used in this subsection, the word "officer" means an officer of the corporation who (i) is the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer of the corporation, (ii) is identified in the corporation's most recent public filings with the United States Securities and Exchange Commission because such person is 1 of the most highly compensated executive officers of the corporation, or (iii) has, by written agreement with the corporation, consented to be identified as an officer for purposes of this subsection.[384]

The statute requires the fiduciary to explicitly consent to personal jurisdiction in any Delaware state court for actions that are currently covered by Section 3114. The fiduciary must personally execute the consent and thus will have actual, annual notice that he or she is consenting to personal jurisdiction in Delaware.

The General Assembly should also add a new subsection to Section 3104 of the Delaware Code, the state's general long-arm statute.[385] The subsection would make fiduciaries amenable to personal jurisdiction in any Delaware court. The subsection should read:

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[383]Note that Section 502(a) currently requires the corporation to list the address for every director. DEL. CODE ANN. tit. 8, § 502(a)(4) (2010). That address can be either the corporation's headquarters or the director's home. E-mail from Eleanor Bice, Franchise Tax Dept., Del. Dept. of State, to author (Mar. 19, 2012, 2:33 PM EDT) (on file with author).

[384]Specifically, this language should be added as a new subsection (7) to Section 502(a) and current subsection (7) should be renumbered as (8). The definition of "officer" is taken from the current language of Section 3114(b). DEL. CODE ANN. tit. 10, § 3114(b) (2009).

[385]*See* DEL. CODE ANN. tit. 10, § 3104 (2008).

> A court may exercise personal jurisdiction over any person who has executed a consent to jurisdiction filed by a corporation under Section 502(a) of title 8.[386]

This language is consonant with current Section 3104(c).

Service of process can be effected under current Section 3104(d), which was amended in 2008 to permit service "by any form of mail addressed to the person to be served and requiring a signed receipt."[387] This form of service will avoid the lugubrious and antiquated method required under the current director consent statute and Chancery Rules. A court rule could specify that the address referred to in Section 3104(d) must be the address specified in the fiduciary's latest filed consent to jurisdiction. The rule could also provide for additional service to the fiduciary at another address if the plaintiff concludes that such other address is more likely to result in actual notice to the fiduciary than the address in the most recent consent to jurisdiction.[388]

Of course, requiring such consents to be filed and ensuring compliance are two different things. However, Delaware law already provides a significant incentive for corporations to file timely and complete annual reports.[389] Section 502(f) prohibits the Secretary of State from issuing certificates of good standing for corporations that, inter alia, do not file completed annual reports.[390] Such good standing certificates are a staple of corporate life and are typically required by contract for nearly every corporate transaction of any significant size.[391] Furthermore, a Delaware corporation has its charter automatically revoked if it fails to file an annual report for one year.[392] Presumably these incentives are sufficient to make the

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[386] *See id.* § 3104(c). Specifically, this language should be added as a new subsection (b) to Section 3104 and the other Sections should be re-lettered as appropriate.

[387] Universal Capital Mgmt., Inc. v. Micco World, Inc., 2011 WL 2347612, at *3 (Del. Super. Ct. June 2, 2011) (quoting DEL. CODE ANN. tit. 10, § 3104(d)(3) (2008)).

[388] *Cf.* DEL. CT. CH. R. 4(dc)(1)(a)(i) (requiring a plaintiff to serve a corporation at the address in the most recent annual report unless the plaintiff concludes that the address is not presently the corporation's principal business address).

[389] *See, e.g.*, DEL. CODE ANN. tit. 8, §502(f) (2010).

[390] *Id.*

[391] *See* VINCENT DI LORENZO & CLIFFORD R. ENNICO, BASIC LEGAL TRANSACTIONS § 17:20 (Nov. 2010); *see also Certificate of Good Standing or Tax Compliance*, MASS. DEP'T OF REVENUE ONLINE SERVS., https://wfb.dor.state.ma.us/webfile/certificate/Public/ Webforms/help/ LearnMore.aspx (last visited July 13, 2012) (indicating that businesses in Massachusetts often need proof of good standing to enter business transactions).

[392] DEL. CODE ANN. tit. 8, § 510 (2008).

great majority of active Delaware corporations file timely reports including the new consents.

Adding the fiduciary consents to the annual report may make timely compliance a bit more troublesome for the corporate agent, employee, or officer charged with ensuring that the report is timely filed; however, that burden should be no greater than that experienced by public companies.[393] These companies must file quarterly and annual reports containing certifications from the chief executive officer and chief financial officer. Those certifications must be manually signed by the CEO and CFO, and may not be signed by an agent or by facsimile signature, which increases the burden on the corporation to assemble in timely fashion the certifications.[394]

B. *The Proposed Statute is Effective and Constitutional*

The *Nicastro* plurality held that explicit consent is sufficient for personal jurisdiction.[395] Justice Ginsburg's dissenting opinion does not disagree with this holding.[396] But nothing in the opinion suggests that the dissenters would not find a defendant's explicit consent to be a sufficient affiliating circumstance making it fair and reasonable for the forum to assert personal jurisdiction.[397] One clear implication of *Nicastro* is that explicit consent is sufficient for personal jurisdiction without an additional minimum contacts analysis.[398] The plurality so holds and the dissenters' expansive view of forum state authority is consonant with that holding.[399]

Personal jurisdiction by consent is a surprisingly confused and opaque area of law.[400] Much of the confusion and opacity is caused by statutes and

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[393] *Final Rule: Certificate of Disclosure in Companies' Quarterly and Annual Reports*, SEC (Aug. 29, 2002), http://www.sec.gov/rules/final/33-8124.htm (last visited July 13, 2012) (indicating that an issuer's principal executive and financial officers are required to certify information contained in quarterly and annual reports).

[394] *See* SEC Rule 13a-14(c), 17 C.F.R. § 240.13a-14 (2011); SEC Rule 15d-14(c), 17 C.F.R. § 240.15d-15 (2011).

[395] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) ("A person may submit to a State's authority in a number of ways. There is, of course, explicit consent.").

[396] *See id.* at 2799 (Ginsburg, J., dissenting) (conceding that consent plays a role in the personal jurisdiction analysis, however, questioning the role of consent as the basis for *all* personal jurisdiction).

[397] *See id.*

[398] *See id.* at 2785, 2787.

[399] *See Nicastro*, 131 S. Ct. at 2787, 2799-02.

[400] *See* Maxwell J. Wright, *Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal Forum-Selection Clause Jurisprudence and a Proposal for Judicial Reform*, 44 LOY. L.A. ENT. L. REV. 1625, 1627 (2011) (positing that confusion with respect to

private agreements that do not explicitly state that they intend to effect consent to personal jurisdiction.[401] Rather, many of those statutes and agreements explicitly select a forum for litigation, agree to arbitration, or appoint an agent for service of process, but are silent about personal jurisdiction, leaving the courts to decide whether a party has consented.[402]

In the corporate law setting, a chronic issue in this regard is whether the universal statutory requirement that a foreign corporation must appoint an agent for service of process results in the foreign corporation's consent to general jurisdiction.[403] States are split on the issue.[404] Delaware, not surprisingly, has held that foreign corporation registration and appointment of an agent for service of process does result in personal jurisdiction, but the better reasoned cases hold to the contrary.[405]

Nothing inherent in the idea of actual consent to personal jurisdiction requires these disputes. In fact, only two small questions could be raised about the legitimacy of a Delaware fiduciary amenability statute based on actual consent.[406] Still, neither provides a good reason to treat this setting differently from a typical consent-to-jurisdiction scenario. The first question has to do with the idea of contract.[407] A defendant, not otherwise subject to personal jurisdiction in a forum, can consent to such jurisdiction and, hence, can appear and defend.[408] In fact, this is presumably what currently happens

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forum-selection clauses has come from a lack of judicial guidance and from the legislature's failure to act).

[401] *See id.*; *see also* Orix Fin. Servs., Inc. v. Murphy, 9 So. 3d 1241, 1242-44 (Ala. 2008) (demonstrating how an agreement may be ambiguous with respect to consenting to personal jurisdiction and how such ambiguity may lead to inconsistent judicial interpretations).

[402] *See id.* at 1242-43, 1246. For a sophisticated discussion of the problem of whether forum selection clause language implies consent to personal jurisdiction, *see* Global Packaging, Inc. v. Superior Ct., 127 Cal. Rptr. 3d 813, 818-19 (Cal. Ct. App. 2011).

[403] *See* Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 436 (2012); Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1181-82 (2003); Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 5-6 (1990).

[404] *See* Rhodes, *supra* note 403, at 441 n.328 (collecting cases generating conflicting holdings regarding the jurisdictional effects of appointing an agent for service of process).

[405] *See* Sternberg v. O'Neil, 550 A.2d 1105, 1107 (Del. 1988). For a recent and particularly intelligent and informed example of a court grappling with the issue of whether the appointment of an agent for service of process results in personal jurisdiction, *see* King v. Am. Fam. Mut. Ins. Co., 632 F.3d 570, 572-73, 577-79 (9th Cir. 2011).

[406] Professor Winship also believes that actual consent is a potential solution to the problem of personal jurisdiction, though she has some reservations as to implementation. *See* Winship, *supra* note 30, at 30-34.

[407] *See id.* at 31.

[408] The United States Supreme Court has upheld personal jurisdiction based on a defendant's consent to personal jurisdiction for nearly a century. *See* McDonald v. Mabee, 243 U.S. 90, 91 (1917).

when fiduciaries of Delaware corporations choose not to contest personal jurisdiction.[409] Warren Buffett in the Berkshire Hathaway litigation made this choice.[410] In that situation, the defendant knowingly waives objecting to jurisdiction.[411]

Equally clear, a defendant can consent in advance by contract.[412] The mechanics of the statute I propose are similar to a contract in that it is a voluntary agreement. It lacks the indicia of a real contract, however, because the fiduciary's consent, while bound up with the agreement to become a director, is not a part of that agreement but is instead concomitant and is an agreement with the state, which is not a party to the fiduciary contract. However, the Supreme Court has not emphasized the contractual nature of consent to jurisdiction agreements; they have simply appeared in commercial and other economic settings.[413]

The second minor question concerns the scope of the consent. The consent is not simply to lawsuits brought by the corporation, but to lawsuits brought by shareholders, and perhaps creditors, who are not parties with whom the fiduciary has agreed.[414] Both the non-contractual aspect and the fact that consent is being given as to suits not by the corporation could be

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[409] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) (noting that the personal jurisdiction requirement is waivable).

[410] *See supra* notes 16-22 and accompanying text.

[411] This decision is analytically different from a defendant not subject to jurisdiction who makes an appearance, files an answer, or files motions without raising the issue of lack of personal jurisdiction but who has not considered whether to contest jurisdiction. In that situation the defendant has not truly consented to jurisdiction but instead is best described as being estopped from challenging jurisdiction. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704 (1982) (citing FED. R. CIV. PROC. 12(h)(1)) (indicating that if personal jurisdiction is not timely raised, it may be waived and the party may be estopped from raising the issue). Since courts do not require an explicit consent by defendants, both these situations look identical to an observer. FED. R. CIV. PROC. 12(h)(1) is written in terms of "waiver" but an unknowing waiver is more accurately described as an estoppel. *Id.*

[412] *See* Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964); *see also Ins. Corp. of Ir.*, 456 U.S. at 703-04 ("[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court.").

[413] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 587 (1991) (considering the enforceability of a forum-selection clause contained in cruise ship ticket); *see also Ins. Corp of Ir.*, 456 U.S. at 699, 703-07 (examining a forum-selection clause included in a business interruption insurance agreement); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2 (1972) (reviewing lower court's decision declining to enforce a forum-selection clause in a international towing contract); *Szukhent*, 375 U.S. at 313-16 (analyzing the use of a forum-selection clause in a lease of farm equipment).

[414] *See* cases cited *infra* note 416 (noting that a corporation, its shareholders, and, when the corporation is insolvent, the corporation's creditors may bring a derivative suit against the corporation).

distinguishing facts from the Supreme Court's approval of such agreements.[415]

Although the fiduciary consents to lawsuits brought by plaintiffs other than the corporation, this consent covers only lawsuits alleging a breach of fiduciary duties. Delaware corporate law is clear that only the corporation, shareholders, and, when the corporation is insolvent, creditors can bring such a lawsuit.[416] The universe of possible plaintiffs is thus delimited when the fiduciary consents to jurisdiction.

Furthermore, all the suits will involve a breach of fiduciary duty so the facts giving rise to the lawsuits and the theories of liability will be circumscribed.[417] The fiduciary will not be exposed to non-corporate law suits nor will he or she be pursued by plaintiffs without some connection to the corporation.[418] Because the plaintiffs and claims are cabined, the fact that the fiduciary consents to jurisdiction in lawsuits brought by those with whom there is no agreement should not raise a due process problem.

The Court has also made clear that consent can be included in an adhesion contact.[419] It does not need to be specifically bargained-for.[420] In *Carnival Cruise Lines*, the Court approved a forum-selection clause in a contract that was "purely routine and doubtless nearly identical to every [such] contract" and as to which the defendants not only had not bargained, but did not have bargaining parity with the other party.[421] That case was not an aberration. As far back as the 1960's the Court approved an adhesion clause appointing an agent for service of process.[422]

Adhesion consent-to-jurisdiction agreements are enforceable if they are fundamentally fair.[423] "Fundamentally fair" is informed by the *Carnival Cruise Lines* Court.[424] The drafter cannot select a jurisdiction in bad faith,

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[415] *See* cases cited *supra* note 412-13 (recognizing that the Supreme Court, on a number of occasions and in various contexts, has approved of parties contractually consenting to jurisdiction).

[416] *See* N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007) ("It is well established that the directors owe their fiduciary obligations to the corporation and its shareholders.").

[417] *See* Lewis, *supra* note 33, at 202-03 (noting that forum selection clause, in the corporate law context, designates one court as a forum for any breach of fiduciary duty claims).

[418] *See id.* (emphasizing that, pursuant to a valid forum selection clause, derivative suits may be brought in the court designated in the forum-selection clause).

[419] *See* Grundfest, *supra* note 71, at 4 (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-95 (1991)) ("[T]he Supreme Court has enforced [forum selection] clauses, even in contracts of adhesion.").

[420] *See Carnival Cruise Lines*, 499 U.S. at 593.

[421] *Id.*

[422] *See* Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-17 (1964).

[423] *See Carnival Cruise Lines*, 499 U.S. at 595.

[424] *Id.*

such as choosing a forum designed to discourage litigation of legitimate claims.[425] Nor can the selection be imposed by fraud or overreaching.[426] The party bound must have notice of the provision and the ability to decline the entire agreement.[427] The defendant must also, of course, have actual notice of the institution of a lawsuit.[428] The test is the familiar one from *Mullane*, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise [defendants] of the pendency of the action and afford them an opportunity to present their objections."[429]

> The [notice] employed must be such as one desirous of actually informing the [defendant] might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform [defendants] . . . , or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.[430]

None of these requirements would invalidate the proposed statute. If anything, the statute is designed to encourage the litigation of legitimate claims by facilitating a forum where all the fiduciaries can be sued.[431] Nothing in the statute prohibits a plaintiff from bringing suit in any other forum. If a plaintiff wishes to sue the fiduciaries where the corporation has its principal place of business, or where a particular corporate action took place, the plaintiff can do so.[432] Furthermore, the Delaware Court of Chancery's obvious competence in making, interpreting, and applying

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[425] *See id.*

[426] *See id.*

[427] *See Carnival Cruise Lines*, 499 U.S. at 590, 594-95 (expressing doubts over whether plaintiffs had actual notice, however, noting that the plaintiffs were prepared to concede that they did have notice and that they had ample opportunity to reject the contract at issue).

[428] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950); *see also* Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 318 (1964) (holding that a prerequisite to a valid judgment is timely notice).

[429] *Mullane*, 339 U.S. at 314 (citing Milliken v. Meyer, 311 U.S. 457 (1940)).

[430] *Id.* at 315 (internal citations omitted).

[431] *See, e.g.*, *Carnival Cruise Lines*, 499 U.S. at 595 (emphasizing that a forum-selection clause should not be used to discourage individuals from pursuing litigation).

[432] A party can take such action in light of the fact that the proposed statute is permissive rather than mandatory.

corporate law to Delaware corporate fiduciaries enhances the fairness of the statute.[433]

The consent would not be imposed by fraud, but rather every fiduciary would know the full extent of his or her consent at the time consent is given because the annual report language would be clear, and the fiduciary would sign the consent specifically.[434]

The fiduciaries have no other relationships with Delaware, so Delaware is certainly not overreaching by requiring explicit consent to personal jurisdiction. Every potential corporate fiduciary is free to decline such position if he or she does not wish to consent to Delaware personal jurisdiction. While that may result in a potential fiduciary declining a position he or she ardently desires, the trade off is certainly one that some may wish to make. No other adverse effect than declining to serve would result.

Finally, as to actual notice of an instituted lawsuit, the statute provides for notice either personally served on the fiduciary or, more typically, service by U.S. mail requiring a signed receipt.[435] In either event, the address at which notice will be delivered is the address provided by the fiduciary in the annual report.[436] The statute also requires the plaintiff to send notice to the fiduciary at an additional address if the plaintiff believes that the other address is more likely to result in actual notice to the fiduciary. U.S. mail requiring a signed receipt is a well-established method of service of process.[437]

C. *Four Public Policy Reasons to Adopt the Proposed Statute*

Delaware should adopt the proposed statute for four policy reasons. First, and most obviously, Delaware is without a constitutionally valid amenability statute for fiduciaries.[438] Second, the proposed statute should

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[433] *See infra* note 442 and accompanying text (recognizing that one of the reasons most businesses choose Delaware to incorporate is the Delaware Court of Chancery's expertise and competence with respect to corporate law).

[434] *See supra* note 394 and accompanying text (requiring corporate fiduciaries to review and execute annual reports).

[435] *See* DEL. CODE ANN. tit. 10, § 3104(d) (2008) (permitting service to be sent to nonresident defendant through registered mail).

[436] *See, e.g.*, DEL. CH. CT. R. 4(d)(c)(i) (indicating that the name and principal business address of a corporation is found in the annual report filed with the Secretary of State of Delaware).

[437] WRIGHT, *supra* note 85, § 1074; *see also* Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347-48 (1999) (recognizing that plaintiff officially served defendant through certified mail).

[438] *See supra* notes 1-2 and accompanying text.

reduce litigation costs because it is workable and constitutional. Section 3114 creates more litigation than needed over the question of personal jurisdiction.[439] It goes without saying that the societal cost of having litigants like David Sokol spend hundreds of thousands of dollars to determine a threshold matter like personal jurisdiction is a large one.[440]

The third and fourth policy reasons to adopt the proposed statute revolve around the high road and low road of Delaware corporate law. On the high road, Delaware has long had an interest, not only in being the dominant state for pseudo-domestic incorporations,[441] but in being the dominant state for litigation of corporate law disputes involving Delaware corporations.[442] This interest is sometimes called an interest in "centering" litigation in Delaware.[443] In the days before *International Shoe*, Delaware was not just the obvious choice for such litigation but the only practical choice.[444] Between *Shoe* and *Shaffer*, the sequestration scheme under Section 366 served that centering purpose.[445]

After *Shaffer*, Section 3114 ensured that corporate litigation was centered in Delaware.[446] But recently a significant part of that litigation has migrated out of Delaware.[447] More importantly, Delaware corporate scholars perceive this development as an important one without a clear solution.[448] Under modern theories of personal jurisdiction, plaintiffs can effectively litigate against Delaware fiduciaries and Delaware pseudo-corporations in other states, even with many defendants and jurisdictions.[449] Furthermore,

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[439] *See supra* notes 243-45 and accompanying text.

[440] *See supra* notes 23-24 and accompanying text.

[441] *See* Stevelman, *supra* note 48, at 67.

[442] *See* BLACK, *supra* note 40, at 1, 5-9; Armour et al., *supra* note 362, at 1349; Beck, *supra* note 362; Jeff Cunningham, *Boardroom Justice*, NACD DIRECTORSHIP (Dec. 17, 2010), http://www.directorship.com/boardroom-justice/. *But see* William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 49, 63 (recognizing Delaware's long history of struggling to retain prominence in corporate filings).

[443] *See* Folk & Moyer, *supra* note 92, at 795.

[444] *See supra* notes 74-78 and accompanying text.

[445] *See* Folk & Moyer, *supra* note 92, at 796.

[446] *See* WOLFE & PITTENGER, *supra* note 41, § 3.05[a][2][ii].

[447] *See* John Armour et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiff's Bar*, 2012 COLUM. BUS. L. REV. 427, 482-85; John Armour & Brian Cheffins, *Is Delaware Losing Its Cases?* (European Corp. Governance Inst., Working Paper No. 151/2010, 2012), *available at* http://ssrn.com/abstract=1578404.

[448] *See* Stevelman, *supra* note 48, at 61.

[449] *See id.*; *see also* Armour et al., *supra* note 362, at 1351 ("[S]uits under corporate law can also be filed in any other court with both subject matter jurisdiction over the claim and personal jurisdiction over the defendants. In practice, the courts of a company's headquarters state are almost always an available forum for both direct suits (including class actions) and derivative suits. Courts of general jurisdiction in that state will have subject matter jurisdiction, and personal jurisdiction

fiduciary duty litigation is frequently brought and effectively litigated in jurisdictions in which personal jurisdiction cannot be obtained over all potential defendants.[450]

To continue centering litigation in Delaware, the General Assembly should adopt the proposed fiduciary amenability provisions.[451] The proposed statute is neither broader nor narrower than Section 3114 but is surer of application over fiduciaries. It is also, like Section 3114, not coercive to plaintiffs, so it will not force an increase in the number of law suits against Delaware fiduciaries.

The final reason for adopting the proposed statute is that it will help Delaware's corporate legal system be perceived as neutral[452] at a time when it is perceived as pro-management and therefore anti-stockholder.[453] This perception and its consequences are at the heart of one of the most important current debates in corporate law for both practitioners and academics alike.[454]

As noted, Delaware courts have been losing corporate litigation to both the federal system and to other states.[455] The cause of this exodus is widely perceived to be political.[456] Specifically, the plaintiffs' bar believes that the Delaware Court of Chancery is dismissing valid cases by raising the pleading standards necessary to survive Rule 23.1 and Rule 12(b)(6) motions or to obtain an injunction.[457] The plaintiffs' bar also believes that the Court of Chancery judges tend to under-award attorney fees in successful cases.[458] Furthermore, plaintiffs' attorneys not admitted in Delaware perceive that filing outside of Delaware gives them a better chance at being named lead attorney and thus controlling the litigation and the division of any fees.[459] Some plaintiffs' attorneys may simply prefer to litigate in their home

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over the directors and officers will normally be available as well.").

[450]*See* Grundfest, *supra* note 71, at 42-43.

[451]*See* Stevelman, *supra* note 48, at 127-31 (shedding light on a number of reasons why Delaware desires to remain the center of corporate litigation).

[452]*See* Quinn, *supra* note 40 ("Strine said Delaware . . . provides a neutral playing ground between managers of companies and its stockholders . . . .").

[453]*See, e.g.*, Armour et al., *supra* note 362, at 1365-66 (indicating that Delaware is perceived as pro-management).

[454]For an excellent summary of the academic literature, *see* Quinn, *supra* note 363, at 139 n.1.

[455]Armour et al., *supra* note 447.

[456]*See* Stevelman, *supra* note 48, at 97.

[457]*See* Alison Frankel, *Tortured Opinion is Strine's Surrender in El Paso Case*, REUTERS, (Mar. 1, 2012, 9:47 PM), http://blogs.reuters.com/alison-frankel/2012/03/01/tortured-opinion-is-strines-surrender-in-el-paso-case/ (criticizing Chancellor Strine for finding egregious behavior by corporate executives and their advisors yet declining to issue injunctive relief); Stevelman, *supra* note 48, at 97.

[458]*See* Stevelman, *supra* note 48, at 101.

[459]*See* Quinn, *supra* note 363, at 143.

jurisdiction because they are familiar with its procedures and customs.[460] Some have suggested that the outcome of litigation outside Delaware is more variable and thus may lead to greater ex ante settlement value.[461] In the view of many, the current Delaware judiciary exhibits a very public bias against shareholder plaintiffs and in favor of corporate managers.[462]

The Delaware courts' responses so far are widely seen as political sops.[463] First, Vice Chancellor Laster invited corporations to adopt forum selection clauses in their certificates of incorporation.[464] Many corporations accepted that invitation, though the trend may be reversing itself. Further, the efficacy of such provisions, especially when placed in the bylaws rather than in the charter, is in some doubt.[465] This is generally conceded to be a pro-management development.[466]

Second, the Court of Chancery has suggested that it is willing to award staggeringly large attorney fees to successful plaintiffs.[467] The most controversial such award was by Chancellor Strine, when he awarded nearly $305 million in attorney fees, or 15% of the recovery in a shareholder class action.[468] Besides being jaw-droppingly large, Strine's opinion was generally regarded as politically motivated.[469] It was meant to send a signal to the plaintiffs' bar that they have no reason to leave Delaware.

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[460] *See* Stevelman, *supra* note 48, at 100.

[461] *See* Theodore Mirvis, *Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, 7 M&A Journal 17 (May 2007).

[462] *See* Weidner, *supra* note 39; Frankel, *supra* note 457.

[463] *See* Stevelman, *supra* note 48, at 97.

[464] *In re* Revlon Inc. S'holders Litig., 990 A.2d 940, 960 (Del. Ch. 2010).

[465] *See* Claudia H. Allen, *Companies Increasingly Seeking Forum Selection in Charters and Bylaws, Report Shows*, 9 SEC. LITIG. REP. 3 (Mar. 2012) (indicating that the number of corporations adopting forum-selection provisions doubled in less than a year and stood at 195 in December 2011). On the reversing of this trend, *see* Tom Hals, *Navistar, Others Retreat From Delaware Lawsuit Rule*, REUTERS, (Mar. 23, 2012), http://www.reuters.com/assets/ print?aid=USL1E8EN46120120323. On the dubiety of such provisions, *see* Galaviz v. Berg, 763 F. Supp. 2d 1170, 1171 (N.D. Cal. 2011).

[466] Joseph A. Grundfest, *Choice of Forum Provisions in Intra-Corporate Litigation: Mandatory and Elective Approaches (The 2010 Pileggi Lecture)* (Oct. 6, 2010).

[467] *See In re* S. Peru Copper Corp. S'holder Derivative Litig., 2011 WL 6440761, at *43 (Del. Ch. Dec. 20, 2011) (awarding attorneys' fees where the remedy amounted to $1.347 billion).

[468] *See id*; Ronald Barusch, *Dealpolitik: Is a Whopping Legal Fee a Marketing Pitch by a Delaware Court?*, WALL ST. J., Dec. 28, 2011, *available at* http://blogs.wsj.com/deals/2011/12/28/dealpolitik-is-a-whopping-legal-fee-a-marketing-pitch-by-a-delaware-court/?KEYWORDS=Lawsuit.

[469] *See* Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* 2-3 (Working Paper, 2012), *available at* http://ssrn.com/abstract=1984758; Barusch, *supra* note 468; Gina Chon & Joe Palazzolo, *An Early Christmas for These Lawyers: $300 Million in Fees for Shareholder Case Sets Off Debate*, WALL ST. J., Dec. 28, 2011, *available at* http://online.wsj.com/article/SB10001424052960 204296804577124772580624142.html.

Adopting the fiduciary amenability statute would help restore a measure of political neutrality to these recent developments. More specifically, it would counter the effect of forum selection charter provisions by providing a fail-safe method of obtaining jurisdiction over corporate fiduciaries. At the same time, it would counter the excesses of pandering to the plaintiffs' bar in that it does not expand in any way the reach of actions for which fiduciaries can be sued.

VI. CONCLUSION

Delaware should adopt the proposed fiduciary amenability act because Section 3114 is unconstitutional. Implied consent, on which Section 3114 is based, has been rejected by the Supreme Court for over half a century. Section 3114 cannot be construed as an actual consent statute, either. Even if Delaware adopted a statute that extended amenability to the constitutionally permitted maximum, as some states do, fiduciaries would not be amenable to personal jurisdiction in Delaware. The plain fact is that they do not have the minimum contacts required under *International Shoe*, especially in light of *Nicastro*. Fiduciaries have not purposefully established the requisite connections to Delaware under due process. Furthermore, it would not be fair and reasonable to assert jurisdiction over them in shareholder litigation given the attenuated relation between fiduciaries, the litigation, and Delaware.

But the fiduciary amenability statute based on the explicit, actual consent of each fiduciary would be both effective as an amenability process and constitutional under cases such as *Carnival Cruise Lines* and *Nicastro*. Moreover, that statute would be strategically and politically wise for Delaware. It would both help Delaware remain the center for litigation involving Delaware corporate law and would further Delaware's goal of being perceived as neither pro-management nor pro-shareholder. In light of the current drain of litigation away from Delaware and its current perception as being pro-management, adopting the fiduciary amenability statute should be a high priority for the Delaware General Assembly.